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REPORTS OF CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

SEPTEMBER TERM, 1891—JANUARY TERM, 1892.

VOLUME XXXIII.

D. A. CAMPBELL,
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In behalf of the people of Nebraska.

Rec. Oct. 30, 1893

THE SUPREME COURT
OF
NEBRASKA.

1892.*

CHIEF JUSTICE,
SAMUEL MAXWELL,

JUDGES,
T. L. NORVAL,
A. M. POST.

OFFICERS.

ATTORNEY GENERAL,
GEORGE H. HASTINGS.

CLERK AND REPORTER,
D. A. CAMPBELL.

DEPUTY CLERK,
W. B. ROSE.

* During the period covered by the first 728 pages of this volume of reports, AMASA COBB was Chief Justice, and SAMUEL MAXWELL and T. L. NORVAL Judges.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

FIRST DISTRICT.

A. H. BABCOCK,	Beatrice.
J. E. BUSH,	Beatrice.

SECOND DISTRICT.

S. M. CHAPMAN,	Plattsmouth.
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THIRD DISTRICT.

ALLEN W. FIELD,	Lincoln.
CHAS. L. HALL,	Lincoln.
A. S. TIBBETS,	Lincoln.

FOURTH DISTRICT.

H. J. DAVIS,	. . . . .	Omaha.
G. W. DOANE,	. . . . .	Omaha.
A. N. FERGUSON,	. . . . .	Omaha.
M. R. HOPEWELL,	. . . . .	Tekamah.
FRANK IRVINE,	. . . . .	Omaha.
W. W. KEYSOR,	. . . . .	Omaha.
C. R. SCOTT,	. . . . .	Omaha.

FIFTH DISTRICT.

EDWARD BATES,	. . . . .	York.
ROBERT WHEELER,	. . . . .	Osceola.

SIXTH DISTRICT.

WM. MARSHALL,	. . . . .	Fremont.
J. J. SULLIVAN,	. . . . .	Columbus.

DISTRICT COURTS OF NEBRASKA. v

SEVENTH DISTRICT.

W. G. HASTINGS, Wilber.

EIGHTH DISTRICT.

W. F. NORRIS, Ponca.

NINTH DISTRICT.

W. V. ALLEN, Madison.

TENTH DISTRICT.

F. B. BEALL, Alma.

ELEVENTH DISTRICT.

T. O. C. HARRISON, Grand Island.

J. R. THOMPSON, Grand Island.

TWELFTH DISTRICT.

SILAS A. HOLCOMB, Broken Bow.

THIRTEENTH DISTRICT.

WILLIAM NEVILLE, North Platte.

FOURTEENTH DISTRICT.

D. T. WELTY, Cambridge.

FIFTEENTH DISTRICT.

ALFRED BARTOW, Chadron.

M. P. KINKAID, O'Neill.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOLUME XXXII.

ROBT. O. ADAMS.

WM. O. WOOLMAN.

The syllabus in each case was prepared by the judge writing the opinion, in accordance with rule 20.

A table of statutes and constitutional provisions cited, construed, etc., numerically arranged, will be found on page xxxv.



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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1891.

PRESENT:

HON. AMASA COBB, CHIEF JUSTICE.
" SAMUEL MAXWELL, } JUDGES.
" T. L. NORVAL,

FREDERICK MEYER v. ALBERTINA ANDERSON.

[FILED SEPTEMBER 22, 1891.]

1. Husband and Wife: TRUSTS: ASSIGNMENT FOR CREDITORS.

A. A., a widow who had received a homestead and other property as a bequest from her deceased husband, married L. C. A. and allowed him to sell the homestead and buy other lands with the proceeds, taking the title in his own name, which he also sold, and upon buying the third or fourth farm, at the request of A. A., the title was taken in the name of A. A. and L. C. A., as tenants in common. Afterwards, L. C. A. traded the farm, of the value of \$1,400, for a stock of groceries, and A. A. joined in the deed of the farm upon the promise of L. C. A. to pay her the one-half of the consideration received by him therefor. L. C. A. proceeded to carry on trade upon the said stock of groceries, and in such trade contracted debts, which, being unable to pay, made an assignment under chapter 6, Comp. Stats. In an action by A. A. against the assignee to establish her claim against the estate of L. C. A., *held*, that she could recover.

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2. Evidence considered, and held, to sustain the verdict and judgment, except as to the excess required to be remitted.

ERROR to the district court for Colfax county. Tried below before MARSHALL, J.

Phelps & Sabin, for plaintiff in error, cited: *Bertles v. Numan*, 92 N. Y., 160; *Hunt v. Johnson*, 44 Id., 31; *White v. Wager*, 25 Id., 333; *Aultman v. Obermeyer*, 6 Neb., 260; *Smith v. Dean*, 15 Id., 433; *Humes v. Soruggs*, 94 U. S., 22; *Bank v. Norwood*, 50 Ark., 42; *Savage v. Murphy*, 34 N. Y., 508; *Carpenter v. Roe*, 10 Id., 227; *Perry, Trusts*, sec. 678; *Schouler, Domestic Relations* [3d Ed.], sec. 119, 678; *Jenkins v. Middleton*, 68 Md., 540; *McClure v. Lancaster*, 24 S. Car., 273; *Glidden v. Taylor*, 16 O. St., 509; *Fisher v. Herron*, 22 Neb., 183; *First Natl. Bank v. Bartlett*, 8 Id., 328; *Bartlett v. Cheesbrough*, 23 Id., 767; *Plummer v. Rummell*, 26 Id., 142; *Brown v. Mitchell*, 102 N. Car., 347; *Bain v. Buff*, 76 Va., 374; *Beecher v. Wilson*, 84 Id., 813; *Kesner v. Trigg*, 98 U. S., 50; *Smith v. Sands*, 17 Neb., 598; *Beels v. Flynn*, 28 Id., 575; *Burt v. Timmons*, 29 W. Va., 441; *Kane v. Weigley*, 22 Pa. St., 179; *Bump, Fraud. Con.* [3d Ed.], 57-59; *Lee v. Cole*, 44 N. J. Eq., 318; *Bailey v. Gardner*, 31 W. Va., 94.

E. T. Hodsdon, and *C. J. Garlow*, contra, cited: *Monteith v. Baz*, 4 Neb., 17; *Linscomb v. Lyon*, 19 Id., 515; *Randall v. Randall*, 37 Mich., 563; *Jaycox v. Caldwell*, 51 N. Y., 395; *Woodworth v. Sweet*, Id., 8; *Whitford v. Daggett*, 84 Ill., 144; *Monroe v. May*, 9 Kan., 466; *Schouler, Hus. and Wife*, sec. 395; *May v. May*, 9 Neb., 22.

COBB, CH. J.

Mrs. Albertina Anderson, defendant in error, commenced her action in the district court of Colfax county, and in and by her petition alleged:

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First—That on or about the 20th day of April, 1885, L. C. Anderson, of Schuyler, made an assignment for the benefit of creditors.

Second—That the defendant, Frederick Meyer, was appointed assignee of said L. C. Anderson, and accepted the trust and entered upon execution thereof.

Third—That on the 26th day of May, 1885, the plaintiff herein filed her claim in the sum of \$1,688.50 in the county court of Colfax county, for money loaned and received by the said L. C. Anderson, and for the property of the said claimant had and received by him to the use and benefit of the said claimant.

Fourth—That the said L. C. Anderson is indebted to the plaintiff in the sum of \$1,688.50, and avers that she was the sole devisee under the last will and testament of her former husband, John Peterson, deceased; that she received under said will certain lands, describing them; that she intermarried with said L. C. Anderson prior to the 16th day of November, 1881, and that on or about the date last mentioned, the above described premises were sold to one Patrick Murphy by her, and that said L. C. Anderson received from the sale of said real estate the sum of \$920 to plaintiff's use; that the said real estate so sold was her separate property, and the said sum derived solely from such separate property; that the said L. C. Anderson, from a portion of the funds so derived from plaintiff's separate property, purchased another farm of Walter Craig, describing the same; that in September, 1882, the said farm purchased of said Craig was sold by said Anderson and plaintiff to Hutton Moore; that on or about July 28th, 1883, said Anderson paid out from said funds realized from the plaintiff's separate estate for the said farm purchased from Craig, the sum of \$600 and received from the sale thereof to said Moore, \$500 in cash and notes, upon which he realized, by discounting the same at the bank, the further sum of \$330, and at about said last

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mentioned date, said Anderson received the further sum of \$41 from the sale of a cow belonging to the plaintiff; that with these funds so received from the plaintiff's sole and separate property the said Anderson purchased of Z. L. Newell the south half of the southeast quarter of section 10 and the northeast quarter of the northeast quarter of section 15 in township 17 north, of range 3 east, in Colfax county; that in September, 1884, said last mentioned tracts of land were sold to Christian Erichson for \$1,400, above the incumbrances thereon; that it was then agreed that the said plaintiff should loan the said L. C. Anderson the said amount derived from the sale of the farm purchased of Z. L. Newell, to wit, \$1,400, and that the said L. C. Anderson promised to pay the same; that the said L. C. Anderson received the sum of \$250 from the sale of a team belonging to the plaintiff, which he agreed to repay to the plaintiff, and also the further sum of \$38.50, being the balance of the purchase price of a team sold by him, which said sum he agreed to repay the plaintiff.

Fifth—That said L. C. Anderson has not paid said sum of money, or any part thereof, and there is now due from the said L. C. Anderson to the plaintiff the sum of \$1,688.50 with interest from September, 1884; whereupon she claims judgment for the sum of \$1,688.50 and interest from September, 1884.

Frederick Meyer, assignee of the estate of L. C. Anderson, made answer as follows:

That he denies each and every allegation therein contained except such as are hereafter expressly admitted. He admitted that on or about the 20th day of April, 1885, L. C. Anderson made an assignment for the benefit of creditors. He admits that he was appointed assignee; that he accepted such trust and entered upon the execution thereof; that on the 26th of May, 1885, the plaintiff filed her claim in the sum of \$1,688.50 in the county court of Colfax county; that the plaintiff at the time and times when the

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plaintiff's husband, L. C. Anderson, the assignor, obtained credit and extension of and from his creditors, Meyer & Schurman and John W. Phillips and others, whose claims are pending the proceedings of assignment for the benefit of creditors, the plaintiff being present, united with her husband in saying and representing that her husband owned all the certain property described in his deed of assignment, and that he owed nothing to any person or persons whomsoever except certain of his said creditors who had sold him goods and merchandise, not including her own claim, she at the same time knowing the real truth as to his real standing indebtedness; that the said Meyer, Schurman, and John W. Phillips, relying upon her said statement and those made by her husband in her presence and hearing, and with her consent, sold goods, trusted and extended credit to said L. C. Anderson, assignor; with prayer that the plaintiff's petition may be dismissed, and for general relief.

The plaintiff for a reply filed a general denial to the said answer. There was a trial to a jury, which found for the plaintiff and assessed the amount of her recovery at \$1,383.42. The motion of the defendants for a new trial having been made and overruled and the plaintiff in open court having remitted the sum of \$172.43 of the verdict, judgment was rendered for the plaintiff in the sum of \$1,211 and costs.

Upon the trial the records of the county court of Colfax county, containing the decree admitting the will of John Peterson to probate, also showing the record of said will, was admitted in evidence on the part of the plaintiff. Also a copy of the will of John Peterson, whereby he did bequeath to his wife, Albertina Peterson, all of his property, both real and personal, to be used by her as to her may seem best; to have and to hold the same absolutely and in her own right.

Mrs. Albertina Anderson, being called as a witness in her own behalf, testified that she formerly resided in Col-

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fax county from the year 1868 to the year 1881. That she then resided on a homestead in Maple Creek; that it was her husband's farm and her husband's name was John Peterson; that he died December 24, 1880; that she was the administrator of his estate; that she afterwards intermarried with L. C. Anderson on the 21st day of April, 1882; that she received from her husband, John Peterson, eighty acres of land together with eight head of horses, thirty head of cattle, between fifty and sixty head of hogs, and a good many other things; that the eighty acres of land which she received from her husband, John Peterson, was sold by her present husband, L. C. Anderson, to Patrick Murphy for the sum of \$920; that \$600 of this money her husband, Anderson, paid to Mr. Craig for another farm which he bought of him; that this latter farm he kept from the spring to the fall of the year when he sold it to Hutton Moore for \$830; with this money her husband, L. C. Anderson, bought a farm called the Newell farm upon which he moved in the spring of 1884. They lived upon this farm six or seven months when her husband, L. C. Anderson, sold that farm for stock in Mr. Erichson's store. Being asked to describe all about that transaction, what was done about his going into business there, she answered: "The money, I realized it from my property, I let my husband have and he went into business and then he failed and I lost the money without my consent." Being asked to state what was done between her and Mr. Anderson about the investment of these funds that were derived from the Newell farm, she answered: "Well, my husband went into the grocery business without my consent and I told him he had better decide first before he had it; he was very much against me but still he did it anyhow; I said for him when he went to town—I told him not to do it before he had decided; still when he came back it was done anyhow. Then of course it happened that way." Being asked to state what was said between her

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and him about this money, she answered: "I did not feel satisfied with it when he had done it; so I was asking when I can get the money derived from the homestead to help my children, to provide for them, and he said the first money he could raise from the store he would pay me back for my children because they need clothing and books and school and such things and I had nothing to give them except that." That this talk was had in the Erichson store. Being asked to state whether or not at any other time she had a talk about that matter, any conversation with him about that, she answered: "I had a conversation several times about to get my money back, but he don't seem he can raise it; but still he always promised but never got anything more." Being asked to state what he promised, she answered, "to pay me the money back." Being asked to state when it was that she first talked about it, she answered: "We talked about it when he first came into town; because I always objected to that."

Q. Did you talk about it at any other time?

A. I all the time talked about him done wrong when he went into the store business because I knew he was not the man to run it.

Q. State whether you talked about it at the farm.

A. Didn't talk very much about it on the farm; just as we came into town and we put the money in there. So long as he was buying and selling farms he always make some money besides, and I was satisfied with that, but when he went in the store business I couldn't feel satisfied; I knew he was not the man to run it.

Q. How many times did you and he talk this matter over?

A. Ah; several times.

Q. Well, state to the jury what the substance of that talk was here in town; state to the jury what that talk was as near as you can recollect it about this matter.

A. Several times we were speaking about it because I

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have nothing to provide for my children. I see I could get it no other way and I was to have it from him. I had nothing to do it with; I always was asking him for the money; he said he would raise the money as soon as he was able to from the store; I had no interest in the store; I was to get the money from there, for my money was in there. When he could not sell in the store and could not make anything he was to pay me back; that was the bargain when he got a cent to sell and buy. Witness further stated that she had a note for \$250 which was received for a team which she had sold and which L. C. Anderson collected and put in the store; also one cow belonging to her which he sold for \$41 and put in the store.

Q. How much was realized from that Newell farm over and above the incumbrances?

A. \$1,400. That none of the said money had ever been repaid to her.

Upon cross-examination she answered that L. C. Anderson had her consent to take of her money \$600 and put it into the land he bought of Craig, at which time he said that whenever he sold the farm she was to have that money back; that he sold the whole Peterson homestead with her consent; that she signed the deed but don't remember the circumstance; that she didn't see the whole of the \$920 paid to her husband but knows that it was paid to him; knew it at the time from her husband; that no written contract was made between her and her husband for the paying back to her of the money derived from the Peterson farm; that it was sold in 1882, in the fall. That she was not present when her husband bought the farm of Walter Craig but that she went along with him to look at the farm when he bought it, but wasn't along when he got the contract or made the payment. That she saw him make a payment of \$200 on the Craig farm, but only knows of the payment of the balance by what her husband told her; that she was willing to let him have the money

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to use, but he always promised to let her have it back again; didn't put that promise in writing; that she signed the deed when he sold the Craig farm; signed it in Mr. Russell's office; that when her husband bought the Craig farm it was taken in his name; when he bought the Newell farm it was taken one-half in plaintiff's name and one-half in his; that he wanted to do it all in his name, but that she wanted to have a part of it anyway to have something that she could claim as her own because she needed it for her children; that the Newell farm was all paid for with her money; was bought of Mr. Newell himself; that her husband raised one crop on the Newell farm, and in the fall he sold the farm, traded it to Mr. Erichson for this stock of goods; that he came home one day and told her that he had sold the farm to Mr. Erichson and was to take Erichson's stock of goods to pay; that she was not along when he made the deed to Mr. Erichson, but remembers very well that Mr. Grimison came up to the house and she signed her name. On being recalled she stated at the time she married her second husband, L. C. Anderson, he had no property of his own.

M. B. Erichson was called as a witness by the plaintiff. Testified that in October, 1884, he bought a farm from L. C. Anderson and that the consideration for which was that Anderson bought witness's goods, and witness taking the farm for \$2,200; that there was a mortgage on it of \$800, making the amount of goods \$1,400. Upon cross-examination witness stated that he made this trade with L. C. Anderson. To the question, "Did you have any talk with his wife at the time?" he answered: "Ah, yes; she knew all about the trade, she wanted to come to town to live; they have to live in town."

Patrick Murphy was called as a witness on the part of the plaintiff. Testified that he has resided in Colfax county since 1872, and is acquainted with Mrs. Albertina Anderson; that he owns the farm she used to own; that

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he paid \$1,000 for it cash down; that there was an old house situated on the land and it was understood that they were to take the house away as it was of no use to him, and they moved it in here to Schuyler. Upon redirect examination he stated that he believed there was something thrown off of the price of \$1,000 in consideration of their moving the house away.

Fred Meyer was sworn as a witness on the part of the defendants. Testified that he is the assignee of L. C. Anderson; that before the assignment witness's firm sold him goods from time to time; that during the six months or more that Mr. Anderson was doing business in the store witness visited the store. The second month after witness's firm had the first dealings with him, witness called on him and inquired about his circumstances financially, and that Mrs. Anderson was present at those times; that Anderson told witness that he owed witness's firm the most, and he owed a few other dollars to parties in Council Bluffs and other places; said that was all he owed; said that he didn't owe anything except for goods; that the first time witness called on Anderson and had these conversations was shortly after he went into business; that some part of the claim witness's firm has against Anderson was contracted before this conversation; most of it was probably sold afterwards; that the most of these goods were sold by the firm's agent, Mr. Sillick; witness sold him some little goods, not much, very little; that the firm's claim against the estate is \$800 or \$900.

H. B. Sillick, sworn as a witness for the defendant, stated that he is acquainted with Mr. Meyer, the assignee, and also with Mr. Anderson, and also with Mrs. Anderson; that he had dealings with Mr. Anderson commencing in October last until some time in April, in 1885; is acting for Meyer & Schurman of Fremont; was selling to Mr. Anderson in their behalf; that at times when he was there selling goods, or for other purposes, he saw Mrs.

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Anderson there, and at such times had conversation between himself and Mr. Anderson about the matter of Anderson's debt; that witness was there for the purpose of collecting the account, that is, the portion of it that was due, and on several different occasions Mrs. Anderson was present, and witness had talked with Mr. Anderson in reference to this account, and witness was urging him very strongly to pay this account, and at different times he showed witness his books, copies of his supposed indebtedness as proof that he was financially responsible for the account that he held in his hands. At one time he took witness in his little office, situated in the middle of his store, and showed him his books, showing what he was owing; that Mrs. Anderson was leaning on the railing surrounding this office; that the railing was perhaps 6x8 feet; the office part may be larger, may be smaller; that he was sitting on the inside at the desk and was showing witness through the books containing his accounts, and, among others, witness remembers of their account, so much money, and saw that of Phillips, of Council Bluffs, and Gronewig and Schotengen, of Council Bluffs. He at that time told witness that that was all he was owing; that he had of Mr. Erichson in full for the stock, which Erichson corroborated afterwards; that she was observing and noticing what was going on; that witness had other orders after that, he sent them into the house.

Allen Cameron was called as a witness on the part of the defense and identified the deed of assignment executed by L. C. Anderson and Albertina Anderson, dated April 28, 1885, whereupon defendant offered said deed in evidence.

The plaintiff being recalled testified that she heard a portion of the testimony of Mr. Meyer when on the witness stand here to-day; that she couldn't hear very well, but that she heard some of it. Her attention being called to a conversation that he testified to as having taken place

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in November or December of the year that Mr. Anderson was in business, when witness Meyer says that Mrs. Albertina Anderson was there, and witness was asked when, if at any time, she ever saw Mr. Meyer in that store, she answered, "I saw him for the first time one morning I came to town and Meyer and my husband had a conversation in the store. My husband introduced Mr. Meyer to me and Mr. Meyer stepped up and offered his chair, and I told him to keep the chair, and just a few moments, the most of it five minutes, I was in the store, he went out." That while witness was in the store at that time Mr. Meyer did not say anything to Mr. Anderson in witness's hearing about how much he owed to parties in Council Bluffs or anywhere else; that she never saw Mr. Meyer at any other time in that store, and never saw him after that until she saw him at Mr. Grimison's office last summer. She further testified that she heard Mr. Sillick testify on the stand. To the question whether at any time he testified to when he said he was in the office in the store where witness ever heard any conversation between him and her husband relative to how much her husband owed, she answered, "No, I never was in the office when there was a strange man in there." To the question, "Did you at that time hear any conversation between Mr. Anderson and Mr. Sillick, any statements whatever as to how much Mr. Anderson owed?" "A. I did not."

Upon the trial the following instructions were given by the court on its own motion (so far as appears), the giving of which is assigned for error:

2. The jury are instructed that the burden is upon the plaintiff, and it is for her to prove every material allegation contained in her petition by a preponderance of the evidence. If upon any one or more of these material allegations the jury find the evidence evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury in that case should

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find for the defendant. The allegations of the petition which are admitted in the answer need no further proof.

The jury are instructed that the burden is upon the defendant, and it is for him to prove every material allegation contained in the second count of his answer. If upon any one or more of the material allegations of this count of the defendants' answer the jury find the evidence evenly balanced, or that it preponderates in favor of the plaintiff, then the defendant cannot succeed upon the defense set up in that count, and as to that defense, the jury should find for the plaintiff. By a preponderance of the evidence is meant the weight of evidence; that which, on the whole evidence, when fully, fairly, and impartially considered by the jury, produces upon the mind of the jury the stronger impression and is more convincing as to its truth when weighed against the evidence in opposition thereto.

5. The jury are instructed that if they from the evidence believe that the money realized from the sale of the Peterson homestead eighty-acre farm was invested and re-invested by the said L. C. Anderson, as the agent of the plaintiff, in other lands, as stated in the plaintiff's petition, with the consent of the plaintiff or by her direction, and that the last farm in which said money was invested was traded as \$1,400 by the said L. C. Anderson for the stock of goods which, together with other property, was assigned by the said L. C. Anderson for the benefit of his creditors, and that the same is held by the defendant as assignee, and if the jury from the evidence believe that the said L. C. Anderson promised to pay back to the plaintiff, as her separate property which was used by the said L. C. Anderson in his business or otherwise, and if the jury further from the evidence believe that the said L. C. Anderson has not paid said sums of money or any part thereof to the plaintiff, then the jury will find for the plaintiff an amount equal to the amount of money or property belonging to the plaintiff as her property which the said L. C. Ander-

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son used and promised to pay back to the plaintiff, unless the jury shall find for the defendant upon the defense set up in the second count of his answer; but if the jury find that defense sustained by the proof they will find for the defendant.

7. The jury are instructed that the material allegations in the plaintiff's petition are the following:

First—That said L. C. Anderson received and used certain sums of money, the separate estate of the plaintiff, and that he sold or disposed of certain property of the plaintiff and used the same for himself.

Second—That he promised to repay the plaintiff the said sums of money and the value of the property so used by him.

Third—That, although requested, he has not paid the same, and the same is still due from the said L. C. Anderson to the plaintiff.

9. The jury are instructed that upon the claim of the plaintiff they should from the evidence determine whether the said L. C. Anderson sold the separate property and land of the plaintiff, and for her, acting as her agent, invested the proceeds of the sale in other lands, and if the jury from the evidence find that he did so sell and invest the proceeds of such sale or sales, then the profits arising from such investment would belong to the plaintiff. And if, from the evidence, the jury further find that the Newell farm was the last investment of the proceeds of such sale or sales, and that this farm was exchanged by said L. C. Anderson to M. B. Erichson for a stock of goods, and that said L. C. Anderson, at or about the time of such exchange, promised to pay back to the plaintiff the \$1,400, the price for which the said Newell farm was taken in the exchange, then the said L. C. Anderson upon the land transactions would be indebted to the plaintiff for said exchange price. This, together with whatever other moneys of the plaintiff he had used and promised to pay back to

her, would be the extent and amount of his indebtedness to her, if the jury, from the evidence, find that he was indebted to her.

10. The jury are instructed that if from the evidence they believe that the said L. C. Anderson took the plaintiff's money while acting in his own behalf, and not as her agent, and invested the proceeds of the sale of her lands in the purchase of other lands and thereby made a profit on such investment or investments, in that case it would be the amount of money so taken, excluding the profit, that would measure or determine the extent of the liability of said L. C. Anderson to the plaintiff, so far as such liability depends upon the appropriation of the proceeds of the sale of the plaintiff's land, for the purchase of which the plaintiff's money was used with or without her consent, or with the promise of the said L. C. Anderson to pay it back to her, would be the extent and amount of his indebtedness to her, if the jury so find he was indebted to her.

11. The jury are instructed that the defense set up in the second count of the defendant's answer is what in law is termed an estoppel *in pais*. This estoppel arises, or is created, whenever a person, by his or her words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief so as to change his previous condition. The person inducing such belief will be estopped, that is, prevented, from afterwards denying the existence of such a state of things, to the prejudice of the person acting. If, from the evidence in this case, the jury believe that said L. C. Anderson represented to his creditors, before they sold him the goods by which they became his creditors, in the presence and hearing of the plaintiff, that he owed no other persons except those who sold goods to him, and that said creditors believed said representations, and acting upon such belief they sold to said L. C. Anderson goods, and gave credit to him for the payment of the purchase price

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thereof, then the plaintiff cannot now be heard to say that the said L. C. Anderson was indebted to her. But if the plaintiff was present at the time such representation was made, but did not hear or understand the representation made by said L. C. Anderson to such creditors, then she would not be prevented from showing or proving his indebtedness to her; or, if the jury, from the evidence, do not believe that the said creditors believed and acted upon such representation in selling said goods, then she would not be estopped or prevented from proving any indebtedness due from the said L. C. Anderson to her.

The following instructions asked for by the defendants were refused, which refusal is also assigned for error:

1. If the money which a married woman might have secured to her own separate use and benefit is allowed to go into the business of her husband and be mixed with his property and is applied to the purchase of real estate for his benefit and advantage, and is permitted to be used for the purpose of giving him credit in his business, and is thus used for a series of years, there being no specified agreement when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. The wife cannot permit the husband to so use her property until he becomes insolvent and then set up a claim to it in fraud of the just claims of the creditors of the husband.

2. The presumption, when a husband receives money of his wife and uses it in his business and in the purchase of property in his name, is that she intended to give and not loan it to him.

3. To rebut this presumption, the proof must be distinct, full, and conclusive, amounting almost to an admission of a contract by which said property was to be considered the property of the wife and a promise to repay the same.

4. By the evidence of the plaintiff herself, and her own

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pleadings, L. C. Anderson was permitted to use the money the plaintiff now claims; was allowed to mix it with his own property, and to be applied to the purchase of real estate in his name and to be used in his business, and if you find that he thereby obtained credit and advantage in his business, and plaintiff allowed him to hold himself out to the world as the owner thereof, and to contract debts on the credit of it up to the time of his insolvency, the court instructs you that it would be against the plainest principles of justice and good conscience, and utterly subversive of fair dealing, to permit the wife to step in and claim her property which she had permitted her husband to hold and proclaim as his, and obtain and enjoy credit and business standing thereby, and thus to defraud the just debts due to his honest creditors.

5. You are instructed that the assignment made, executed, and delivered was the assignment of Mrs. L. C. Anderson, the plaintiff, as well as that of her husband, L. C. Anderson.

6. You are instructed that the assignment offered in evidence and relied upon by plaintiff is not in substance and effect such an instrument as is required by law to convey title to the assignee, and is void.

7. You are instructed that it is your duty under the law, and in view of the evidence, to find a verdict for the defendant.

8. You are instructed that the plaintiff cannot maintain this, an action at law against the assignee of her husband, growing out of an agreement made between husband and wife, and you will therefore find for the defendant.

The cause is brought to this court by the assignee, by petition in error, upon the following assignments:

1. The verdict is not sustained by sufficient evidence.
2. The verdict is contrary to law.
3. The court erred in overruling defendant's motion to dismiss the action after plaintiff had rested her case.

4. The court erred in overruling defendant's first motion and request to be allowed to amend his answer and conform to the proof.

5. The court erred in overruling defendant's second motion and request to amend his answer and conform to the proofs.

6. The court erred in refusing to give the first, second, third, fourth, fifth, sixth, seventh, and eighth paragraphs of instructions asked by the defendant.

7. The court erred in giving the second, fifth, seventh, ninth, tenth, and eleventh paragraphs of the instructions given on the motion of the court.

8. The court erred in overruling the motion for a new trial.

It will not be deemed necessary to take up these assignments separately, neither to consider the evidence relative to the various transactions of the said L. C. Anderson with the property, the proceeds of the estate of the said John Peterson, devised by him to the plaintiff Albertina. It is not deemed important to consider the status of the property purchased by the said L. C. Anderson, the title of which was taken in his own name. Had the plaintiff questioned any of the sales of such property made by L. C. Anderson, or had he become indebted and a controversy arisen between her and his creditors, it would have become necessary, probably, for the appropriate court to have settled the status of such property, but fortunately such was not the case. It seems, from the evidence, that the homestead left by the said John Peterson by will to the plaintiff was sold by the said L. C. Anderson after his intermarriage with the plaintiff, and the proceeds invested in other property. This money was turned over several times and finally was invested in what is known in the case as the Newell farm, but before taking the deed of the Newell farm, the said L. C. Anderson, recognizing the claim of the plaintiff to, at least, one-half of the money which was going into that

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property, took the deed in their joint names. This could have been objected to by no one, unless it might be that the plaintiff could have, with propriety, insisted that the whole title should have gone into her name. Certainly, no one was in a position to object to the property being taken in their joint names. It appears from the evidence that there was an incumbrance of \$800 on this property. The interest of the Andersons in it was regarded as \$1,400 in the trade by Anderson to M. B. Erichson. In regard to this trade the evidence is conflicting, the plaintiff testifying that her husband, Mr. Anderson, went into the grocery business without her consent, and while her testimony is not easy to be understood, indicating that she is not fully mistress of the English language, yet I think it sufficiently indicates that her husband took an unwarranted liberty in trading away her interest in the land; that she never consented to it, and only signed the deed therefor upon the assurance that her share of the price of the farm would immediately be paid to her out of the proceeds of the grocery. The investment in the grocery then being \$1,400, it is very clear that, at least, between Mr. and Mrs. Anderson, she was the owner of \$700 of that investment. It further appears from the evidence that at about that time Mr. Anderson became possessed of a note belonging to Mrs. Anderson, the plaintiff, which she had obtained for a team, also a part of the estate bequeathed to her, to the amount of \$250; that he collected this note and put the money into the store; also, that he sold a cow belonging to the plaintiff for \$41, which money he also put into the store. The money proceeds of these two pieces of property—this note and the cow—seemed to have been put into this business without the consent or even the knowledge, at the time, of the plaintiff. Had it even been otherwise, there can be no pretense that at this time L. C. Anderson was at all indebted, and hence there could have been no intention on the part of the plaintiff

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to hinder, delay, or defraud his creditors. This court will doubtless adhere to the doctrine of *Fisher v. Herron*, cited by counsel for plaintiff in error, but in order to do so it will not have to deny the right of the plaintiff as a creditor under the assignment of her husband, L. C. Anderson.

This is an action under the provisions of sections 16, 17, 18, and 19 of chapter 6 of the Compiled Statutes, the assignment law, and the effect of the judgment in favor of the plaintiff was that the amount found in her favor should be entered of record in like manner as the other claims allowed against the estate of the assignor.

That part of the answer of the assignee presented a defense to her claim as the second ground of defense in which he sets up an estoppel. This defense was fairly submitted to the jury by the court in the second clause of the second charge given by the court on its own motion as above set out. This instruction was based upon evidence, which evidence is conflicting; that of the witness H. B. Sillick tending to sustain the allegations of the answer claiming an estoppel, while that of the plaintiff on her own behalf contradicting each material allegation thereof. It was a question for the jury to decide. This question, by their verdict, they decided in favor of the plaintiff.

The fourth and fifth assignments of error are based upon the overruling of the motions of the defendant to be allowed to amend his answer to conform to the proof. My understanding of the practice is that when a defendant desires to amend his answer in any particular, he should present a draft of such answer to the court and ask leave to file it. Upon such request being denied, it should be made a part of the bill of exceptions so that the appellate court may be able to see whether such amendment ought to have been permitted, which was not done in this case, nor does it appear in what manner or respect the defendant desired to amend his answer, and I confess that I am unable to see that the answer could have been so

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amended upon either of the said motions as to have given the defendant any advantage, or have saved any right which he did not have under the answer as it stood, or would have had upon any amendment thereof which it is conceived he could have made. But upon a recast of the interest upon the plaintiff's claim, it appears that the verdict was for somewhat more than it should have been, arising no doubt upon an error in computing the interest. The plaintiff will therefore be required to enter a remittitur in this court for the sum of \$18.99, as of the date of the judgment, within thirty days of the filing of this opinion, or the judgment will be reversed and a new trial awarded, but in the case of her filing such remittitur within the time above limited, the judgment is

AFFIRMED.

THE other judges concur.

F. G. KIENE V. CHARLES SHAEFFING.

[FILED SEPTEMBER 22, 1891.]

1. Statute of Frauds: PERFORMANCE WITHIN A YEAR. A verbal contract of employment, to be void by the statute of frauds, must be one that from its terms the parties did not intend should be completed within the year.
2. A contract of employment from month to month, although continued for three and a half years, is not within the statute.

ERROR to the district court for Boone county. Tried below before TIFFANY, J.

Charles Riley, for plaintiff in error, cited: *Peter v. Compton*, 1 Smith's Lead. Cas. [8th Am. Ed.], 614; *Brown*, Stat. of Frauds [4th Ed.], 332; 3 *Parsons*, Cont. [6th Ed.], 39, 57; *Stone v. Dennison*, 13 Pick. [Mass.], 1.

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443	126
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James S. Armstrong, and I. L. Albert, contra, cited: Connolly v. Giddings, 24 Neb., 131; Walker v. R. Co., 1 S. E. Rep. [S. Car.], 336; Bullock v. Turnpike Co., 3 S. W. Rep. [Ky.], 129; R. Co. v. Scott, 10 S. W. Rep. [Tex.], 99; 1 Addison, Cont. [Am. Ed.], 318, sec. 212.

MAXWELL, J.

This action was brought by the plaintiff against the defendant to recover the sum of \$190 excess of money paid for wages unearned. An itemized copy of the account is set out in the petition.

The defendant in his answer "admits that he received the various items of account set out in the plaintiff's petition, and that he performed the services therein mentioned. But the defendant avers that the said services were rendered upon an oral contract entered into by and between the plaintiff and the defendant, whereby it was mutually agreed and understood between said parties that the defendant was to perform the services for the plaintiff set out in said petition in the itemized account thereto attached, and the defendant was to receive therefor the sum and the agreed price of \$25 per month, and that for the said services as set out in said itemized account there remains a balance due and owing to this defendant the sum of \$20 after allowing all just credits." On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered dismissing the action.

The testimony shows that in August, 1885, the defendant began to work for the plaintiff as a farm hand, at \$25 per month. On this point there is no dispute. He continued in the service of the plaintiff for forty-two months. Upon this point there is no controversy, neither is there any dispute as to the amount of money which the plaintiff has paid to the defendant—the aggregate being \$1,031.85.

The plaintiff contends that there were two contracts;

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that after the expiration of the first month's service the parties made a new contract whereby the defendant was to have steady work and continue in the plaintiff's employment at \$20 per month. The contract was oral.

The plaintiff asked the following instruction: "You are instructed that an oral contract which by its terms cannot be performed within one year is void. If, therefore, you find from the evidence that a contract was made between the plaintiff and the defendant, not in writing, by the terms of which the defendant was to work for the plaintiff for a longer time than one year, the defendant would be entitled only to such compensation as his services were reasonably worth; the value of such services in that case you are to determine from the evidence, and if less than the amount defendant has received from the plaintiff, you will find for the plaintiff and assess his damages at the amount of the excess so received." This the court refused to give, and such refusal is now assigned for error and is the principal ground on which a reversal is sought.

The instruction was properly refused. The statute only applies to contracts which cannot be fully performed according to the intent of the parties, within the year. To be void the contract must be one that by its very terms shows that it was not to be completed within the year. (*Fenton v. Emblers*, 3 Burr. [Eng.], 1278; *Boydell v. Drummmond*, 11 East [Eng.], 142; *Roberts v. Tucker*, 3 Exch. [Eng.], 632; *Eley v. Positive, etc., Co.*, L. R. 1, Ex. Div. [Eng.], 20; *Giraud v. Richmond*, 15 L. Jour. [Eng.], 180; *In re Pentreguinea Coal Co.*, 4 De G., F. & J. [Eng.], 541; *Walker v. Johnson*, 96 U. S., 424; *Hinkle v. Fisher*, 104 Ind., 84; *N. F. Ins. Co. v. Greene*, 77 Id., 590; *Saunders v. Kastenbine*, 6 B. Mon. [Ky.], 17; *Farwell v. Tillson*, 76 Me., 227; *Lawrence v. Cook*, 56 Id., 187; *Herrin v. Butters*, 20 Id., 110; *Linscott v. McIntire*, 15 Id., 201; *Somerby v. Buntin*, 118 Mass., 279; *Chaffe v. Benoit*, 60 Miss., 34; *Kimmins v. Oldham*, 27 W. Va., 258; *Day v. N. Y. C. R.*

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Co., 22 Hun [N. Y.], 412; 8 Am. & Eng. Ency. of Law, 688.)

A somewhat similar question was before the supreme court of Minnesota in *La Du-King Mfg. Co. v. La Du*, 31 N. W. Rep., 938. In that case there was an oral contract of employment for five years, which was terminated on account of sickness in two years. The court held that although the contract was void, yet in so far as it had been voluntarily executed, the terms thereof would govern as to the compensation. In the case at bar, so far as appears, the employment was from month to month, and the contract could have terminated at the expiration of any month. The fact that the defendant continued in the plaintiff's employment for three years and a half, does not of itself make the contract one for more than a year. The contract could have been performed within a year and is not void, and the only real question at issue between the parties is in relation to the second contract claimed by the plaintiff.

The jury found for the defendant on this question, and as the evidence on that point is conflicting and nearly equally balanced, the verdict will not be set aside. The judgment is therefore

AFFIRMED.

THE other judges concur.

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C. P. JEWETT V. C. E. OSBORNE.

[FILED SEPTEMBER 22, 1891.]

1. **Bill of Exceptions: FAILURE OF JUDGE TO SIGN.** Excuses for the failure of the judge, before whom a cause was tried, to sign a bill of exceptions which is not signed, cannot be considered as a reason for sustaining the bill.
2. ———: ———. A bill of exceptions must be authenticated in

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some of the modes provided by law to authorize a reviewing court to act upon it. If a judge refuses to settle and sign a bill duly presented to him for that purpose, the court, in a proper case, will compel action on his part and endeavor, as far as possible, to save the rights of the parties, but it cannot give credence to an unsigned bill.

3. Petitions set out in the opinion, liberally construed, state a cause of action, and after verdict will be sustained.

ERROR to the district court for Keya Paha county. Tried below before KINKAID, J.

H. M. Utley, for plaintiff in error.

A. J. Burnham, *contra*.

MAXWELL, J.

This action was brought in the district court of Keya Paha county by the defendant in error against the plaintiff, in error to recover damages caused by the destruction of certain property by fire.

On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of \$161.23, and a motion for a new trial having been overruled, judgment was entered on the verdict. The cause was tried on the 6th day of June, 1889, and the motion for a new trial overruled and judgment on the verdict rendered on the 22d of that month.

On the 21st of November, 1889, application was made to Judge Kinkaid, before whom the case was tried, to settle and sign a bill of exceptions, and he made the following statement on the proposed bill:

"This cause coming on for hearing on the application of defendant and to settle a bill of exceptions in this case, and the objections of plaintiff thereto, I find, on the facts herein and of record, defendant is not entitled to have a bill of exceptions settled in this case and his application is therefore refused, to which defendant excepts.

"Nov. 21, 1887.

M. P. KINKAID, *Judge*."

The plaintiff in error, notwithstanding the refusal of the judge to settle and sign the proposed bill, filed the same in the office of the clerk of the district court, and it is now before us.

A motion is now made by the defendant in error to strike the alleged bill from the files because the same is not signed by the judge—in other words, is not authenticated. The motion must be sustained. The statute authorizes the clerk of the district court to sign the bill when the parties agree that it is correct, and consent in writing that he may sign the same. Otherwise the judge before whom the cause was tried must settle and sign the bill. If he refuses to settle and sign the same, the law has provided a remedy to compel action. That must be done by a direct proceeding. In a collateral inquiry this court cannot enter into an inquiry as to the reasons which would justify the judge in refusing to affix his signature to the bill.

The bill not being signed, the motion must be sustained.

It is alleged that the petition on which the case was tried is defective and fails to state a cause of action. The petition is as follows:

“First—That plaintiff has the right of possession, and was, on the 8th day of April, A. D. 1887, in the possession, of the following described land, to-wit: The E. $\frac{1}{2}$ N. E. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, all of sec. 10, town 32, range 20, Keya Paha county, Nebraska, by reason of a United States homestead filing.

“Second—That on the 8th day of April, 1887, the defendant, Charles P. Jewett, did operate and run a saw-mill near the land above described; that the said mill was run by power furnished and supplied by a steam boiler, the steam in said boiler being generated by a fire built and furnished with wood.

“Third—That the said boiler was negligently furnished by defendant with a poor and defective screen, and that the

smoke-stack of said boiler was negligently screened and operated in an improper and defective manner.

"Fourth—That the defendant run and fired the said boiler in an improper, careless, and defective manner, thereby endangering and destroying property.

"Fifth—That on the 8th day of April, 1887, by reason of the negligence herein set forth, plaintiff herein was damaged and injured by reason of defendant negligently allowing sparks of fire escaping from the boiler herein mentioned, and setting on fire the grass in the immediate vicinity of said boiler, and that the fire thus caused did overrun the property and premises of the plaintiff herein described, and did burn, destroy, and injure property and timber of plaintiff, situate and being upon the land herein described, to the amount of \$379." An itemized statement of the property and goods of plaintiff so destroyed is hereto annexed, marked 'Exhibit A' and made a part of this petition.

Exhibit A is as follows:

2 hogs, wt. 200 lbs. each.....	\$15 00
2 shoats.....	5 00
50 bu. corn.....	30 00
300 ft. lumber.....	10 00
1 cow shed.....	10 00
1 stable ..	15 00
1 corn crib.....	10 00
1 hog pen.....	5 00
1 doz. chickens	2 00
Timber burnt and killed.....	277 00
	<hr/>
	\$379 00

The answer to this is a general denial. Upon these issues the cause was tried and so far as we know no objections were made to the introduction of the evidence.

After the rendition of the judgment objections were made to the sufficiency of the petition, which were sustained, and leave given to file a new petition, which is as follows:

"First—That plaintiff has the right of possession, and was, on the 8th day of April, A. D. 1887, in possession, of the following described land, to-wit: The E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, all of section 10, township 32, range 20, Keya Paha county, Nebraska, by reason of a United States homestead filing and held by plaintiff in compliance of the laws of the United States.

"Second—That on the 8th day of April, 1887, the defendant Chas. P. Jewett did operate and run a saw-mill near the land above described; that said mill was run and operated by power furnished and supplied by a steam boiler, the steam in said boiler being generated by a fire built and furnished with wood.

"Third—That the said boiler was negligently furnished by defendant with a poor and defective screen over the smoke-stack of said engine and boiler, and that the smoke-stack of said boiler was negligently screened and operated in a careless and improper and defective manner by negligently allowing the screen over said smoke-stack to remain open.

"Fourth—That the defendant run and fired the said boiler in an improper, careless, and defective manner, thereby negligently endangering and destroying property.

"Fifth—That on the 8th day of April, 1887, by reason of the negligence herein set forth and complained of by the plaintiff on the part of the defendant, the plaintiff herein was damaged and injured by reason of defendant negligently allowing sparks of fire to escape from the boiler and smoke-stack herein mentioned and setting on fire the grass in the immediate vicinity of said boiler and smoke-stack, and that the fire thus caused did overrun the property and premises of plaintiff herein described, and did burn, destroy, and injure property and timber of plaintiff, situated and being upon the land herein described, to the amount of \$379. An itemized statement of the property

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and goods of plaintiff so destroyed is hereto annexed and marked 'Exhibit A' and made a part of this petition."

In our view these petitions are sufficient to sustain a verdict for loss of property by fire from negligence of the defendant below. The petitions are not models by any means, but, liberally construed, they do in effect allege that the defendant below negligently and carelessly permitted his steam engine to cast out fire therefrom, into the combustible material adjoining said mill and set fire thereto, which spread onto and over the plaintiff's land, and burned up and destroyed the property named of the plaintiff. The statement of the plaintiff's interest in the property is not as full as it should have been, but the remedy for that defect is by motion, and it is impossible for us to say what, if any, damages were allowed for the alleged destruction of particular items.

Upon the whole case it is apparent that there is no error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

STEWART-CHUTE LUMBER CO., APPELLANTS, v. M. P.
R. CO. ET AL., APPELLEE.

[FILED SEPTEMBER 22, 1891.]

Mechanics' Liens: MATERIAL FURNISHED SUBCONTRACTOR ON RAILROAD. Lumber sold to subcontractor on a railway, for the erection of shanties for his employes, and stables for his teams, is not within the statute granting a lien for labor performed or material furnished in the construction, repair, and equipment of the railroad, and gives no right of action against the railway company. *Stewart-Chute Lumber Co. v. Mo. Pac. Ry. Co.*, 28 Neb., 39, overruled. COBB, CH. J., dissents for reasons stated in his former opinion.

REHEARING of case reported 28 Neb., 39.

For a synopsis of the briefs of counsel see former report. In addition to the cases there given :

Chas. O. Whedon, for appellant, cited : *White Lake Lumber Co. v. Russell*, 22 Neb., 129; *Yearsley v. Flanigen*, 22 Pa. St., 491; *Odd Fellows' Hall v. Masser*, 24 Id., 510.

Talbot & Bryan, *contra*, cited : *Davis v. Livingston*, 29 Cal., 283; *Walker v. Hauss Hijo*, 1 Cal., 184; *Bottemly v. Grace Church*, 2 Id., 90; *McCormick v. Water-works*, 40 Id., 185; *Dudley v. R. Co.*, 30 Am. & Eng. R. Cases [Mich.], 236; *Oppenheimer v. Morrell*, 12 Atl. Rep. [Pa.], 307; 2 *Jones, Liens*, secs. 1234, 1235, 1251, 1352, 1634, 1672; *Knapp v. R. Co.*, 6 Mo. App., 205; *Perkins v. Pike*, 42 Me., 141; *Willemette T. & M. Co. v. Remick*, 1 Ore., 169; *Odd Fellows' Hall v. Masser*, 64 Am. Dec. [Pa.], 675; *Zeigler v. Galvin*, 45 Hun [N. Y.], 44; *Jones v. Walker*, 63 N. Y., 612; *Foster v. Dohle*, 17 Neb., 631; *Marrenger v. Paxton*, Id., 634; *Hommel v. Lewis*, 104 Pa. St., 465; *Power v. McCord*, 36 Ill., 214; *C. & St. L. R. Co. v. Watson*, 85 Id., 531.

MAXWELL, J.

An opinion was filed in this case in 1889, which is reported in 28 Neb., 39, the judgment of the court below being reversed and judgment entered in this court for the plaintiff. As that decision was rendered by a divided court, a motion for a rehearing was sustained and the cause is again submitted to the court.

The facts in brief are these: One Marcus Kavanaugh was a subcontractor on the Missouri Pacific railway, in the construction of that road from Weeping Water to Lincoln, and purchased from the plaintiff building material to the amount of \$296.19 for the construction of shanties for the

persons employed by him on his subcontract, and also for the construction of stables for the teams used by said employes in grading the road. The shanties and stables had no connection whatever with the railway. Under this state of facts can the plaintiff enforce its claim against the railway company for the amount of Kavanaugh's debt?

Sec. 1, art. 2, chap. 54, Compiled Statutes, provides "That whenever any laborer upon any railroad, canal, viaduct, bridge, ditch, or other similar improvement in this state shall have just claim or demand for labor performed on any such railroad, canal, bridge, ditch, viaduct, or other similar improvement against any person or persons who are, or any company which is, a contractor on such railroad, canal, viaduct, or bridge, or against any person or persons who are subcontractors with any person or persons, or company, contracting with any such railroad, bridge, viaduct, or ditching company for the construction of any part of such railroad, bridge, canal, viaduct, or ditch of any such company, every such railroad, canal, bridge, or ditch company shall be liable to pay such laborer the amount of such claim or demand with ten per cent interest thereon; *Provided*, Such laborer shall have given notice within sixty days after the last item of labor shall have been performed that he or she has such claim or demand. Such notice shall be given in writing, and shall specify the peculiar nature and amount of the claim or demand, and shall be delivered to the president or vice president, superintendent, agent, or the managing director, or chief engineer of any such company, or to the engineer in charge of that portion of the work, or any portion of the railroad, canal, viaduct, bridge, or ditch upon which such labor is performed.

"Sec. 2. When material shall have been furnished or labor performed in the construction, repair, and equipment of any railroad, canal, bridge, viaduct, or other similar improvement, such labor and material, man, contractor or

Stewart-Chute Lumber Co. v. M. P. R. Co.

subcontractor, shall have a lien therefor, and the said lien therefor shall extend and attach to the erections, excavations, embankments, bridges, road-bed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging, all of which, including the right of way, shall constitute the excavation, erection, or improvement provided for and mentioned in this act."

The lien is given for material which "shall have been furnished or labor performed in the construction, repair, and equipment of any railroad." These words do not include lumber, material, or labor which was not performed or furnished in the construction, repair, or equipment of the road. If this were not so there would be no limit to the liability of a railway company. If by a strained construction of the statute, the company is held liable for material used for shanties, it would by the same rule be liable also for food and clothing for the employes, and feed for the teams, and it would be difficult to tell where its liability would cease. The lien is created by statute, and independent of that no cause of action exists against the company.

The question here presented was before the supreme court of Michigan in *Dudley v. Toledo, etc., Ry. Co.*, 32 N. W. Rep., 885, and it was held that debts incurred for the board and clothing of hands employed in constructing the railroad, and feed for teams used in that business, do not come within the provisions of the statute, and cannot be enforced against the railway company. That decision in our view is correct.

It follows that the judgment heretofore rendered by this court is reversed, and the judgment of the court below

AFFIRMED.

NORVAL, J., concurs.

COBB, CH. J., dissents for reasons stated in his former opinion.

JOHN GAUGHRAN ET AL. V. MARY CROSBY.

[FILED SEPTEMBER 22, 1891.]

1. **Error of Proceedings: MOTION FOR NEW TRIAL.** In order to review the proceedings in the trial of an equity cause by petition in error, a motion for a new trial must be filed in the district court the same as in an action at law.
2. ———: ———. The failure to file such a motion is not sufficient grounds for dismissing the petition in error.

ERROR to the district court for Dakota county. Tried below before NORRIS, J.

Jay Bros., and C. L. Wright, for plaintiffs in error.

Spalding & Taylor, and John T. Spencer, contra, cited, as to the proceedings in error: Sch. Dist. v. Cooper, 29 Neb., 433; Phenix Ins. Co. v. Readinger, 28 Id., 587; Dunham v. Courtnay, 24 Id., 627; Harrington v. Latta, 23 Id., 84; Carlow v. Aultman, 28 Id., 672; Cheney v. Wagner, 30 Id., 262.

NORVAL, J.

On the 15th day of March, 1888, one Hugh Gaughran, then a resident of Dakota county, died leaving his brothers and sisters, John Gaughran, Bridget Morf, Peter Gaughran, Mary Crosby, Catherine Leith, and Mat. Gaughran, his sole heirs at law. In January, 1888, Hugh Gaughran conveyed his real and personal property to the defendant, Mary Crosby, his sister.

The plaintiffs in error brought this action to set aside the deed to the real estate and the bill of sale of the personalty executed by said Hugh Gaughran in favor of said Mary Crosby, on the ground that the same were procured by fraud and undue influence exerted by the defendant.

33	33
38	211
33	33
41	254
33	33
48	615
33	33
44	768
33	33
56	526
33	33
58	213
58	431
33	33
61	17

Gaughran v. Crosby.

Upon the pleadings and proofs the court found the issues in favor of the defendant, and dismissed the action. The plaintiffs prosecute error to this court.

The case is submitted on a motion to dismiss, and upon the merits.

The defendant in error moves to dismiss the petition in error for the reason that no motion for a new trial was filed in the district court. While it is indispensable that a motion for a new trial be made in the trial court, in order to entitle a party to a review by proceedings in error of the errors occurring at the trial, yet the failure to file such a motion is not sufficient ground for dismissing the petition in error, as the errors assigned may be based upon the pleadings and judgment, and this court will not, on a motion to dismiss, look into the record to ascertain if such is the case. (*Cheney v. Wagner*, 30 Neb., 262.) The motion to dismiss is therefore overruled.

No motion for a new trial having been filed in the district court, we are precluded from examining any of the alleged errors which occurred during the trial, or whether the evidence is sufficient to sustain the finding and judgment. (*Cropsey v. Wiggernhorn*, 3 Neb., 108; *Hosford v. Stone*, 6 Id., 380; *Cruts v. Wray*, 19 Id., 581.) Although this is an equity cause, in order to review the proceedings on error a motion for a new trial was as necessary to be presented to the district court as in an action at law. (*Carlou v. Aultman*, 28 Neb., 672.)

The transcript having been filed in this court more than six months after the judgment was rendered, the case cannot be treated as an appeal. As all the matters complained of in the petition in error relate to the proceedings during the trial, which we cannot consider for the want of a motion for a new trial, and the pleadings being sufficient to sustain the findings of the district court, its judgment is

AFFIRMED.

THE other judges concur.

STATE, EX REL. SAMUEL WESSEL, v. D. M. WEIR ET AL.

[FILED SEPTEMBER 22, 1891.]

1. **COUNTIES: INDEBTEDNESS: WARRANTS.** A county board cannot lawfully incur an indebtedness against the county in excess of the taxes levied for the current year, nor can they issue warrants in any one year exceeding in the aggregate eighty-five per cent of the levy, unless there is money in the treasury for the payment of the same.
2. ———: **TAXATION: CONSTITUTIONAL LIMIT.** The constitution prohibits a county board from levying taxes which in the aggregate exceed one and a half dollars per one hundred dollars valuation, unless authorized by a vote of the people of the county.
3. ———: ———: **REFUSAL OF BOARD TO INCLUDE CLAIMS IN ESTIMATE: MANDAMUS.** The county board of S. county audited and allowed certain *bona fide* claims against the county, but refused to include the same in the estimate of the taxes to be levied for the ensuing year. *Held*, That *mandamus* will lie to compel the performance of the duty.

ORIGINAL application for *mandamus*.

Pound & Burr, for relator, cited: *Clark v. Dayton*, 6 Neb., 192; *State v. Cathers*, 22 Id., 792.

Robert Ryan, *L. O. Hull*, and *H. T. Conley*, *contra*, cited: *U. P. R. Co. v. Buffalo Co.*, 9 Neb., 452; *B. & M. R. Co. v. Clay Co.*, 13 Id., 370; *Rogers v. Walsh*, 12 Id., 30; *Blair v. Lantry*, 21 Id., 259; 15 Am. & Eng. Ency. Law, 1222.

NORVAL, J.

This is an original application for a writ of *mandamus* to compel the respondents, D. M. Weir, Chas. U. Grove, and John A. Green, the county commissioners of Sioux county, to include in the estimate of the expenses of said

38	36
143	614
33	35
50	395
38	35
158	277

State, ex rel. Weasel, v. Weir.

county, certain audited and allowed claims owned by the relator, and to levy and collect a tax to pay the same.

On the 29th day of November, 1889, the board of county commissioners audited and allowed on the road fund, the claim of Murphy & Whiting, for grading a public road, the sum of \$125, and on the same day the sum of \$200 was allowed on the bridge fund to said Murphy & Whiting, in full payment for the erection of the Antelope creek bridge.

On December 26, 1889, the following claims were audited and allowed on the general fund :

No. 742, Chas. C. Jameson, for making tax list..... \$216

No. 754, Murphy & Whiting, court house extras..... 251

On January 6, 1890, claim No. 765, of C. C. Jameson, for salary and expenses as county clerk, was audited and allowed on the general fund, in the sum of \$120; and on the 16th day of the same month there was allowed on claim No. 767, to E. D. Satterlee, as salary as county attorney and expenses, the sum of \$122.25. The relator is the owner of all of the above claims, the same having been duly assigned to him.

No appeal has been taken from the allowance of any of said claims, nor is the justness of the same questioned, yet the board of county commissioners refused and neglected to include these claims in their estimate of the expenses of the county.

Counsel for the respondents, in their supplemental brief, argue that Sioux county is not liable for the payment of the relator's claims for the reason that they were allowed after the tax levy for the year 1889 was exhausted, and that said indebtedness was incurred in excess of the levy of taxes for said year.

Section 34 of chapter 18, Compiled Statutes, provides that "It shall be unlawful for the county board of any county in this state to issue any warrants for any amount exceeding the aggregate of eighty-five per cent of the amount

State, ex rel. Wessel, v. Weir.

levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same; nor shall it be lawful for the county board to issue any certificate of indebtedness in any form in payment of any account or claim, nor make any contract for, or to incur any indebtedness against the county in excess of the tax levied for county expense during the current year; nor shall any expenditure be made or indebtedness be contracted to be paid out of any of the funds of said county in excess of the amount levied for said fund."

The legislature, by the above section, has limited the power of county boards in incurring county indebtedness. They cannot lawfully incur an indebtedness against the county in excess of the tax levied for the current year, nor can they issue warrants on any fund in any one year exceeding in the aggregate eighty-five per cent of the amount levied for said fund for said year, unless there is money in the treasury to the credit of such fund for the payment of the same.

The proofs show that the total levy of taxes for the year 1889, in Sioux county, for county purposes was \$8,106.78, divided into three funds, as follows: General fund, \$5,135.56; bridge fund, \$2,162.34, and road fund, \$810.88. Warrants to the amount of \$300 have been drawn against the last named fund. The proof fails to show what amounts have been audited and allowed on the general and bridge funds. There is, however, in the record "Exhibit B," being the certificate of the county clerk, which states "that the general fund was exhausted to the limit as provided by law on the 22d day of July, 1889, by warrant No. 509 issued on that date; that the bridge fund was exhausted to the limit as provided by law on the 28th day of August, 1889, by warrant No. 6 issued on that date." The certificate of the county clerk is merely the legal conclusion of the officer, without stating any fact upon which to base the same. It certainly cannot overthrow the presumption that

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the county board did its duty in allowing these claims. There is an entire absence of proof to show that, when the indebtedness was contracted, the levies for 1889 were exhausted, or that the board in contracting the indebtedness exceeded the limit authorized by law. As to the claims for making the tax list and the salaries of the county clerk and county attorney, it is safe to say that the provisions of section 34, in so far as they limit the power of county boards to create county indebtedness, and bind the county for its payment, have no application. The salary of a county officer is not an indebtedness of the county which is created or incurred by the county board. The law makes it the duty of the county clerks and county attorneys to discharge the duties of their respective offices imposed by law, and they cannot refuse to perform the same on the ground that the tax levy has been exhausted, nor is the county for that reason relieved from paying the salaries of such officers, but must provide for the payment of the same by making estimates and levies the next succeeding year.

As already stated, the tax levied by the county board in the year 1889 for road fund amounted to \$810.88. Under the provisions of section 76, chapter 78, Compiled Statutes, one-half of all money paid into the county treasury in discharge of road tax constitutes a road fund in counties not under township organization, which is at the disposal of the county commissioners for road purposes, the other half of the money paid into the county treasury as road tax, constitutes a distinct road fund, and is to be expended by the road overseer. The one-half of the levy in Sioux county for road purposes in 1889, or \$405.44, was, therefore, at the disposal of the respondents for road purposes. There is in the record the certificate of the county clerk to the effect that warrants to the amount of \$300 were drawn on the road fund. It does not, however, appear at what date they were drawn, nor that they were issued before the indebtedness of \$125 to Murphy & Whiting was contracted,

or before the claim therefor was allowed. So far as the record discloses, the indebtedness, for which the \$300 in warrants were issued, was contracted subsequently to the incurring of the liability to Murphy & Whiting. From the record before us we conclude that the claims herein involved are legal and binding obligations of Sioux county.

At the meeting of the county board in January, 1890, an estimate of the expenses of the county for the year 1890 was made as required by law, which included the claims of the relator. At the July, 1890, meeting of the board, by resolution, the items in the estimate of expenses, which included the claims in controversy in this case, were stricken from the estimate for the reason, as stated in the preamble to the resolution, that the actual necessary expenses of running the county for the year 1890 will equal the entire revenue of the county, and there will be nothing left to pay the indebtedness of the county incurred in previous years. The levies made by the board in 1890 amount, in the aggregate, to fifteen mills on each dollar valuation. No greater levy could have been made without a vote of the people. Section 5, article 9, of the constitution provides that "county authorities shall never assess taxes, the aggregate of which shall exceed one and a half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of the constitution, unless authorized by a vote of the people of the county."

It is contended by the respondents that as the valuation of the county will not permit a levy and estimate large enough to pay the relator's claims and the current expenses of the county, the county commissioners were justified in refusing to provide for the payments of the claims of the relator. If it be true that the respondents may lawfully exhaust all the revenues of the county for current expenses without making any provision for the payment of the just indebtedness of the county already incurred, then the

State, ex rel. Wessel, v. Weir.

only alternative left the relator is a vote of the people of the county authorizing the levying of a tax for the payment of his claims. And should such a question be submitted to a vote of the people, it might fail to carry. We do not think the relator is compelled to submit to such an alternative. His claims are just, and the indebtedness was incurred in carrying on the county government. If the indebtedness was so large that its payment would absorb so much of the revenues of the county, as to leave the county board practically without means to meet the current expenses of county government, we might be called upon to require only a portion of the plaintiff's claims to be paid in one year and the balance out of future tax levies. So far as is disclosed by this record the relator's claims constitute the entire indebtedness of the county, which has not been provided for. It is not believed that the payment of these claims out of the next tax levies will seriously embarrass the county.

The county clerk and county treasurer were made defendants, but it does not appear that they have refused to perform any official duty, and as no relief is asked against them the action is dismissed as to them. A peremptory writ of *mandamus* will issue against the board of county commissioners requiring them at their session in January, 1892, to include the amounts of the relator's claims in the estimates of taxes to be levied for said year, and at the proper time levy taxes for the payment of the same.

WRIT ALLOWED.

THE other judges concur.

Scott v. Chope.

R. M. SCOTT ET AL. V. EMMA CHOPE.

[FILED SEPTEMBER 29, 1891.]

1. **Liquors: ACTION FOR LOSS OF SUPPORT: INSTRUCTIONS.** Upon the trial of a cause brought by C. against S. and others, for damages for the loss of support in the death of her husband, whose death was caused by the defendants' having furnished intoxicating liquors to the said husband which he drank and which made him intoxicated, and in which intoxicated condition he started for his home and became lost, lost his team, and endeavoring to pursue his way on foot became exhausted, and the weather being very cold, and the snow deep, became frozen and died, some evidence was given by defendants, without allegation by answer, tending to disprove that freezing was the cause of the death, and that it was caused by violence. The court on its own motion charged the jury that if it should find from the evidence that the deceased came to his death by violence inflicted by any other person, and that the person inflicting the violence was intoxicated at the time, and that he obtained the liquor, which caused his intoxication, from the defendants, or either of them, and that he would not have used such violence except as the result of such intoxication, in that case such of the defendants and their bondsmen as furnished such intoxicating liquor would be liable. The verdict being for the plaintiff, on error, *held*, that the giving such charge was not reversible error.

2. —: **LICENSE: EVIDENCE: THE VILLAGE RECORD,** or minute book of the trustees, showing the proceedings of the board in relation to granting liquor licenses and the approval of the bonds of liquor sellers, *held*, admissible in evidence.
3. —: **TRIAL: JURY:** The petition alleged that S. and G. obtained a liquor license in the village of A.; that C. and H. became sureties on their bond; that C. and S. also obtained a liquor license in said village, and W. and S. became sureties on their bond; that afterwards S. and G. and C. and S., respectively, being engaged in the sale of intoxicating liquors under their respective licenses, W. C., the husband of the plaintiff, obtained of them, in their respective liquor saloons, intoxicating liquors which he drank, which made him intoxicated, and caused his death and loss of support by the plaintiff. At the close of the trial, it being late in the night, the court directed the jury that should they agree upon a verdict

33	41
140	274
40	279
41	281
33	41
42	116
33	41
44	632
33	41
45	826
33	41
48	147
33	41
51	408
52	176
53	481
55	17
33	41
56	642

Scott v. Choze.

during the night, that their foreman should sign it in their presence and seal it up, and that they then might separate and come in at the meeting of the court next morning. The next morning, the jury, having agreed upon a verdict, sealed it, and separated during the night, came into court and delivered their verdict as set out in the body of this opinion. The court refused to receive said verdict, but sent the jury out with directions to correct it. Whereupon the jury returned the verdict as set out in the body of this opinion, which was received. *Held*, No error.

4. ———: ———: ———: CHALLENGES. The overruling of the challenge for cause, of the jurymen Timmerman upon his examination, as set out in the opinion, *held*, no error.
5. ———: JOINT ACTIONS: MOTION FOR NEW TRIAL. In a joint action against six defendants, S., G., C., H., W., and Sh., the verdict was against all the defendants. There was a joint motion for a new trial by all of the defendants except H., who made no motion. There was evidence to sustain the verdict as to the defendants S., G., and H., but not as to Sh., and doubtful as to W. and C. *Held*, That the motion for a new trial was rightly overruled as to all the defendants.
6. ———: WAIVER: THE ASSIGNMENT OF ERROR, that the damages are excessive, appearing to have been given under the influence of passion or prejudice, not being argued or referred to in the brief of counsel, is not examined.

ERROR to the district court for Valley county. Tried below before TIFFANY, J.

J. N. Paul, Aaron Wall, O. A. Abbott, and Thomas Darnall, for plaintiffs in error, cited, as to the motion for a new trial: *Tidd's Prac.*, marginal, p. 911, and cases; *Sperry v. Dickinson*, 82 Ind., 138; *Graham v. Henderson*, 35 Id., 195; *Easton v. Calendar*, 11 Wend. [N. Y.], 96; *Richards v. Walton*, 12 Johns. [N. Y.], 434; *Gray v. Richardson*, 18 Pick. [Mass.], 417; *Shirley v. Lunenburg*, 11 Mass., 384; *Smetters v. Rainey*, 14 O. St., 288; *Buckingham v. Bank*, 21 Id., 131; *Blanchard v. Gregory*, 14 O., 415. As to the jurors: *Curry v. State*, 4 Neb., 549; *Brunell v. R. Co.*, 5 Id., 453.

A. M. Robbins, and *A. Norman*, *cōntra*, cited, as to the motion for a new trial: *Real v. Hollister*, 20 Neb., 112; 17 Id., 661; *Wiggenhorn v. Kountz*, 23 Id., 691; *Long v. Clapp*, 15 Id., 424; *Dutcher v. State*, 16 Id., 33; *Dunn v. Gibson*, 9 Id., 513; *Feeney v. Mazelin*, 87 Ind., 229; *Estey v. Burke*, 19 Id., 87; *Teters v. Hinders*, Id., 93; *Eichbrecht v. Angerman*, 80 Id., 208; *Bank v. Colter*, 61 Id., 153; *Robertson v. Gartshwiler*, 81 Id., 463; *Boyd v. Anderson*, 102 Id., 221; *Sperry v. Dickinson*, 82 Id., 138; *Thompson*, *Trials*, sec. 2721; *Boldt v. Budwig*, 19 Neb., 739, 746. As to the jurors: *Bohanan v. State*, 18 Neb., 57. As to the sixth instruction: *Rogers v. Millard*, 44 Ia., 466; *Sackett's Instruction to Juries* [2d Ed.], 22; *Thornton's Instructions to Juries*, sec. 201; *Union Ins. Co. v. Buchanan*, 100 Ind., 63; *Bowers v. Thomas*, 22 N. W. Rep. [Wis.], 710; *Flanders v. Cottrell*, 36 Wis., 564; *Stetler v. R. Co.*, 49 Id., 609; *Marschuetz v. Wright*, 50 Id., 175, 178; *Hoffman v. Gordon*, 15 O. St., 211; *Chamberlain v. R. Co.*, Id., 250; *Hogg v. Mfg. Co.*, 5 O., 410; *Pugh v. Calloway*, 10 O. St., 493; *Scott v. Sheakly*, 3 Watts [Pa.], 50. As to the separation of the jury: *Abbott's Trial Brief*, 183, 184; *Warner v. R. Co.*, 52 N. Y., 437; *Tyrrel v. Lockhart*, 3 Blackf. [Ind.], 136; *Reitenbaugh v. Ludwick*, 31 Pa. St., 131; *Bolster v. Cummings*, 6 Me., 85; *Sulliff v. Gilbert*, 8 O., 405; *Mason v. Massa*, 122 Mass., 477; *Brown v. Dean*, 123 Id., 254; *Maclin v. Bloom*, 54 Miss., 365.

COBB, CH. J.

This cause comes to this court upon error from the district court of Valley county, in which court the defendant in error recovered a judgment against the plaintiffs in error. The cause of action set out in the petition in the court below is as follows:

"1. That on or about the — day of April, 1887, the

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defendants, R. M. Scott and John Gorman, as principals, and John G. Cory and Edgar L. Hall, as sureties, made and executed their certain bond to the state of Nebraska in the penal sum of \$5,000, conditioned that the said defendants, Scott and Gorman, would pay all damages, fines, forfeitures, and penalties that might be adjudged against them under the provisions of the law regulating the sale of malt, spirituous, and vinous liquors; that in accordance with said law regulating the sale of said liquors, the village authorities of the village of Arcadia duly approved said bond and issue a license to said defendants, Scott and Gorman, jointly, in due form of law, to sell malt, spirituous, and vinous liquors in the said village of Arcadia for the period of one year from the — day of May, 1887, to the — day of May, 1888; that under and by virtue of said license so issued the said Scott and Gorman were so engaged in the traffic and business of selling malt, spirituous, and vinous liquors at the said village of Arcadia on the 30th and 31st days of December, 1887.

"2. That on or about the — day of April, 1887, the defendants, John G. Cory and William Shamburg, as principals, and John Wall and R. M. Scott, as sureties, made and executed and delivered to the state of Nebraska their certain bond in the penal sum of \$5,000, conditioned that the defendants, John G. Cory and William Shamburg, would pay all damages, fines and forfeitures, and penalties that might be adjudged against them under the provisions of the law regulating the sale of malt, spirituous, and vinous liquors; that in accordance with said law regulating the sale of said liquors, the village authorities of the village of Arcadia duly approved said bond and issued a license to said John G. Cory and William Shamburg, jointly, and in due form of law, to sell malt, spirituous, and vinous liquors in said village of Arcadia for the period of one year from the — day of May, 1887, to the — day of May, 1888, and under and by

virtue of the license so issued the said Cory and Shamburg were engaged in the traffic and business of selling malt, spirituous, and vinous liquors in the said village of Arcadia on the 30th and 31st days of December, 1887.

"3. That during the time aforesaid the plaintiff, Emma Chope, was, and for a long time prior thereto had been; the wife of William Chope, and is the mother of Clarence Chope, the minor son of the said William Chope and the plaintiff, who is of the age of six years, and that the plaintiff and said minor son were dependent on the said William Chope for their means of support.

"4. That the said William Chope was an able-bodied, industrious, and energetic man of twenty-four years of age and provided a good living for his family, the plaintiff and child aforesaid, and that the proceeds of his labors and earnings amounted to about the sum of \$600 per year, which said sum was applied to the support of his family aforesaid.

"5. That on the 30th or 31st days of December, 1887, the said William Chope obtained liquors from the defendants Scott & Gorman, and from the defendants Cory & Shamburg, at and in their saloons in the village of Arcadia, which said liquors were sold to said William Chope by the defendants Cory & Shamburg and Scott & Gorman, and were there drank by the said William Chope, and that by reason of the liquors so furnished and sold to the said William Chope, by the said Scott & Gorman and the said Cory & Shamburg, and drank by him, the said William Chope, he became intoxicated and exceedingly drunk.

"6. That in said drunken and intoxicated state and condition the said William Chope started for his home about 7 o'clock in the evening; that the said William Chope resided at that time about eight miles from the said village of Arcadia, and that by reason of the intoxication aforesaid the said William Chope lost his head and became lost

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on the prairie, and wandered about until he became numb and stiff from the effect of the aforesaid intoxication and laid down, and was unable to go further and then and there was frozen to death; and that the death of the said William Chope was caused by the liquors so sold by the defendants to the said Chope and obtained from them, the said defendants, by him and drank by him, and the intoxication then and there produced.

"7. That the said William Chope became numb, stupefied, and bewildered, and lost his way and upset and overturned his sled, and became lost from his team and lost on the prairie, and became frozen to death, and plaintiff has thereby been deprived of the means of support to herself and child aforesaid which would otherwise have been furnished by said William Chope fully in consequence of the traffic of said Scott & Gorman and Cory & Shamburg in said intoxicating liquors as aforesaid, and the sale or giving away to said William Chope of the intoxicating liquor aforesaid and so drank by him as aforesaid, and by reason thereof the condition of said bonds have become broken and this plaintiff entitled to recover from the principals and sureties on said bonds her just and adequate damages so as aforesaid sustained thereby; and further, that said plaintiff has suffered damages by reason of the death of her husband as aforesaid in the loss of her means of support to herself and child aforesaid, in the sum and to the amount of \$10,000, and that no part of the same has been paid and the same is now wholly due from the defendants to the plaintiff.

"8. That plaintiff is unable to set out or attach to the petition a copy of the liquor bonds so executed as aforesaid for the reason that, as she is informed and believes, the said bonds have been withdrawn from the possession of the officers of the village of Arcadia, and are now under the control of the defendants; that plaintiff has made diligent search for said bonds, and made inquiry and demand

of the proper officers of said village of Arcadia for said bonds or a copy of the same, but cannot obtain the same, and was told by said officers that said bonds had been taken away from them and could not be furnished, and therefore plaintiff is unable to attach to her petition a copy of the same; with demand for judgment to the amount of \$10,000 and costs."

The said defendant John Wall made answer to the above petition, and in his own behalf admitted that "during the spring of 1887 he signed a bond as one of the sureties of John C. Cory and William Shamburg, then doing business as copartners under the style and firm name of Cory & Shamburg, but whether the bond so signed by the defendant was the same bond sued on in this case the defendant has no knowledge except such as is derived from an inspection of the plaintiff's petition, and therefore denies that he executed the bond sued on in this cause, and demands proof of said fact and of the nature thereof, as alleged in the plaintiff's petition, and denies that he has, or ever has had, possession of the bonds sued on, and denies that he has any knowledge of its whereabouts, or ever had any such knowledge.

"2. That he has no knowledge as to whether the said William Chope drank any liquor at the time alleged, or whether such liquor in any way or manner contributed to the death of the said William Chope, except such as is derived from an examination of said plaintiff's petition, and therefore denies said facts, and each and every of them, and demands such proof.

"3. That on or about the — day of —, 1887, and long prior to the date of the alleged sale of liquors by said Cory & Shamburg to said William Chope, the firm of Cory & Shamburg was dissolved by mutual consent, and that at the time of the alleged sale of liquors to the said William Chope, and for a long time prior thereto, the said firm of Cory & Shamburg had ceased to do business under

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their license, and have never since resumed their business relations or engaged in the sale of liquors of any kind at Arcadia or elsewhere, whereby said license became null and void, and this defendant and all other sureties on their said bonds released from all the conditions thereof, and denies every allegation in said petition contained not herein expressly and in terms admitted, and prays to go hence without day and for his costs."

The defendant Edgar L. Hall made answer in said cause for himself only, in which he alleged that he denies all and single the allegations in the plaintiff's petition contained.

The defendants R. M. Scott and John Gorman made and filed their answer in said cause in their own behalf, in which they admitted that during the spring of 1887 they obtained license of the village board of the village of Arcadia, and that they were doing business under the firm name and style of Scott & Gorman, and they, doing business under the firm name of Scott & Gorman, executed a bond to the state of Nebraska in the penal sum of \$5,000, but they deny that they or either of them know of the whereabouts of said bond, and they therefore deny that the same is the bond sued upon in this action, and they demand that the plaintiff be required to prove the same; that they deny that William Chope obtained any liquor of these defendants, or that he drank any liquor obtained of these defendants at the time or times mentioned in plaintiff's petition, or at any other time, and they deny that the said William Chope came to his death by reason of, or in consequence of, having drank intoxicating liquors, and deny that they in any way or manner contributed to or caused the death of the said William Chope by any of the means aforesaid or in any other manner whatever. They deny such (*sic*) other allegations in plaintiff's petition contained and not in his said answer admitted.

The defendant John G. Cory made and filed his answer to the above petition and alleged:

"1. That he admitted that in the month of May, 1887, he was engaged with one William Shamburg, one of the above named defendants, in the business of retail dealer in the village of Arcadia, in the county of Valley, and that said business was conducted under the firm name and style of Shamburg & Cory. He further admits that the said firm made and executed a bond as required by law; and defendant, further answering, says that he knows nothing of the whereabouts of said bond, and that he has never seen the same since it was executed, nor has not now, nor never has had the same in his possession since the execution thereof, and whether said bond was filed or not he has no knowledge or information by which he could admit or deny and, therefore, demands proof.

"2. That on or about the 6th day of July, 1887, and long before the date of the alleged sale of liquors to the said William Chope, the firm of Shamburg & Cory was, by mutual agreement, dissolved, and that notice of said dissolution was published in the *Arcadia Courier*, a paper of general circulation in the said county of Valley, and said first publication was made July 6, 1888, and after which said dissolution of the 6th day of July, the defendant removed from the village of Arcadia and said copartnership ceased to exist on the said 6th day of July, and that said defendant has had no interest, either directly or indirectly, in said business since the 6th day of July, 1887.

"3. He denies each and every allegation contained in said plaintiff's petition not herein specifically admitted or denied.

"4. He has no knowledge or information of signing a license or bond of Scott & Gorman, as alleged in plaintiff's petition, and therefore neither admits nor denies the same, but calls for proof."

It appears, in a negative kind of a way, from the record, that the default of the defendant William Shamburg had been entered in the case, and it appears that on De-

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ember 4, 1888, he filed a motion in court to set aside the default against him and that he be allowed to enter his separate answer in the case, as it is said in the motion, for the reasons set out in the affidavit and answer hereto attached. Then follows the paper referred to as an affidavit and answer purporting to have been filed on the same day in the office of the clerk of said court. This paper is in the form of an affidavit by the said William Shamburg, and alleges that he is one of the defendants in the case now pending in the district court in and for Valley county and said state, wherein one Emma Chope is plaintiff and R. M. Scott and others are defendants; that summons in said case was served on him on the 11th of February, 1888, and that very soon thereafter, and before the time for answering had expired, affiant was called to Chicago, Illinois, to come immediately and without delay to the bedside of his sister, who was very ill and not expected to live; and that he went immediately to Chicago and found that she was dead and that his nephew and a son of this sister was very ill upon affiant's arrival in Chicago, and that he remained and assisted in nursing the said child throughout his entire sickness and up to his death; that by reason of said sickness and death affiant was sorely grieved in mind, and wholly neglected to attend to any of his affairs in this state for the period of five or six weeks and until long after the time for final answer in said cause; that he has a meritorious defense to this action, in that at the time of the death of William Chope, as set forth in plaintiff's petition, this affiant had no interest in the saloon in Arcadia, Nebraska, as set out in said petition, and that affiant was not engaged in the occupation, either directly or indirectly, of selling malt, spirituous, and vinous liquors.

There was a trial to a jury, with a finding and judgment for the plaintiff. The defendants bring the cause to this court on error. Twenty-four errors are assigned, as follows:

"1. The court erred in overruling the motion of the plaintiffs in error for a new trial.

"2. The verdict is contrary to law.

"3. The verdict is not sustained by sufficient evidence.

"4. Errors of law occurring at the trial and duly excepted to at the time.

"5. The damages are excessive, appearing to have been given under the influence of passion or prejudice.

"6. The court erred in refusing to give the first, second, and third instructions asked by the defendants.

"7. The court erred in giving instruction number six (6) of its own motion.

"8. The court erred in giving instruction number seven (7) of its own motion.

"9. The court erred in giving instruction number eight (8) of its own motion.

"10. The court erred in giving instruction number five (5) asked by the plaintiff.

"11. The court erred in giving instruction number six (6) asked by the plaintiff.

"12. The court erred in admitting a minute book and records and papers of the village of Arcadia, over the objections of the defendant.

"13. The court erred in permitting the jury to return to their room to change their verdict after having returned a sealed verdict into court and having separated.

"14. The court erred in receiving the verdict of the jury as it now is.

"15. The court erred in not receiving the first verdict of the jury.

"16. The court erred in directing the jury to return to their room and bring in another verdict than was by them returned in court.

"17. The court erred in giving instruction to jury No. A after first verdict was returned into court.

"18. Irregularity in the proceedings in this court al-

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lowed the jury to separate and go out of the custody of the officers before the return of the last verdict, and after arriving at their first named verdict and sealing same, but before its return into court.

"19. The defendants John Wall and John G. Cory especially except to the above alleged errors and instructions refused and excepted to, and instructions given at request of plaintiff and duly excepted to by these defendants.

"20. The court erred in giving instruction No. B of its own motion duly excepted to by defendants.

"21. The court erred in giving instruction No. C and duly excepted to by defendants.

"22. The court erred in overruling the defendants' challenge, for cause, to juryman W. J. Timmerman, to which ruling and decision of the court defendant excepted at the time.

"23. The court erred in calling the jury together after they had signed and sealed their verdict and separated and gone, and then sending them out to amend their verdict, which was duly excepted to by defendants at the time.

"24. The court erred in permitting the jury to return the last verdict, which was different in form and in amount from the first verdict, which was duly excepted to at the time."

There was evidence on the part of the plaintiff that the plaintiff was the wife of William Chope, and that plaintiff and her husband were the parents of Clarence Chope, an infant son seven years old at the time of the trial; that William Chope, at the date of his death, was about twenty-four years old; that he and his wife, having emigrated from Illinois about a month before, were temporarily residing with George Stone, the father of Mrs. Chope, on his farm at a point ten or twelve miles northwest from the village of Arcadia in Valley county; that William Chope was, on that day, to-wit, the 30th day of December, 1887, in good health; that he and plaintiff had been married about seven

and one-half years, and that they were married in the state of Illinois, where he was engaged in farming and teaming and in operating a farm on shares for his father most of the time. During that time they went to the state of Iowa, where they remained about a year, he being engaged in teaming, cutting hay, and similar occupations. From thence they returned to the state of Illinois and remained about three years, he being engaged in teaming and contracting, whereupon they emigrated to this state as aforesaid; that he had made arrangements to take a place on shares for the ensuing year, but had made no binding contract therefor; that he was a man of industrious habits, a good and successful teamster and manual laborer, but addicted to the use of ardent spirits. All the evidence in the record upon that subject is to the effect that his earnings were about \$600 a year, which he devoted to the support of his family, which the evidence tends to show he supported in good and comfortable style for a laboring man. The enumeration of personal chattels and furniture, made on cross-examination by the plaintiff when on the witness stand, shows this. Besides the furniture and household goods suitable for a family of the size and condition of his, he also was the owner of a good team of horses, a wagon and sled, there being a mortgage incumbrance upon the wagon.

The evidence further tends to prove that on the forenoon of the 30th or 31st of December, 1887, the deceased, William Chope, and his father-in-law, George Stone, left the house of the latter, where also the deceased was temporarily residing, with a load, or part of a load, of pork upon a bob-sled drawn by two horses, and drove to the village of Arcadia; that after arriving there and disposing of their pork and transacting some other business, the deceased preceded his father-in-law into one of the two saloons or places where intoxicating liquors were sold at retail in that village, being followed soon after by Stone.

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They two obtained from the keeper of said saloon and drank each a glass of beer. This was followed soon after by the deceased calling for and each drinking a glass of whisky. Also that they soon after went out of that saloon and into the other saloon or place of selling liquor, and there engaged in the pastime called shaking dice for the drinks, and there drank, in what appears from the evidence to have been rather rapid succession, several drinks of whisky which they obtained from the barkeeper of said last mentioned saloon. It is clear from the testimony that by this time they were both greatly under the influence of intoxicating liquors which they had drank and far on the road towards gross inebriety. The day was quite cold, considerable snow on the ground and freezing. Somewhere about 8 o'clock at night they took their team from the stable where it had been put up and started for home. It appears from the evidence that they were utterly bewildered upon starting, neither of them knowing apparently which way to go in order to gain the road which led in the direction of their home. They stopped at a number of places within a few miles from Arcadia to inquire the way and to warm. At about 10 o'clock of that night they appeared at the house of the witness James Sterling, about six and one-half miles northwest of Arcadia and near the road leading to the residence of Stone. Stone reached the house of Sterling first, and by hammering on the door waked Mr. Sterling up and, upon invitation, he entered the house and behaved in a manner indicating that he was intoxicated. After setting down and warming himself at the invitation of Mr. Sterling, he stated that their team had got away from them and that Will, as he called his son-in-law, the deceased, was gone after them. Shortly afterwards, Chope, the deceased, also came in, and, at his solicitation, Mr. Sterling got up and went with them to the place where the team had got away from them, Stone remaining at the house until Sterling and Chope

went to the place where the horses had got away from the sled and found that the horses had gone, taking with them the forward bob of the sled and leaving the wagon bed, which was on the sled, and the rear bob there. Mr. Sterling persuaded Chope that the horses had probably gone home, and Chope returned to the house with him, where they found Stone, who had extinguished the light in a vain attempt to light his pipe, and who was exceedingly loath to leave the house, but upon Chope insisting that he must and would go home they left together on foot at about 10 o'clock at night, according to the evidence of Mr. Sterling, although I think from the whole evidence it was considerably later than that. They were at this time evidently both quite intoxicated, from their actions and the smell of liquor upon the young man, the deceased, according to the evidence of Mr. Sterling. The night was very cold and stormy at this time.

There is evidence tending to prove that there was an unoccupied house or shanty some half a mile or more from the residence of Mr. Sterling; that they reached that point and spent a considerable time in the lee of the house sheltering themselves from the cold northwest wind.

From the evidence of Stone and the fact of the dead and frozen body of Chope having been found the next day at the place it was, it would appear that leaving this shanty they pursued their way about three-quarters of a mile further in the general direction of Stone's house where Chope became unable to go further, where he fell and laid down, and Stone being unable to arouse him, remained with him evidently until about morning, when he left him and succeeded in reaching the house of Mr. Webster at about half-past eight o'clock.

As above stated, it appears that at this time there were two saloons or places where intoxicating liquors were sold at retail in the village of Arcadia. One is called by some of the witnesses the "East" saloon. This, it appears, was at the

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time kept by the defendants Scott & Gorman, and it was in this saloon that the witness Stone and the deceased first drank on that day, and there they both drank beer and whisky, and from there they went directly to the other saloon which some of the witnesses call "Reed's" saloon and some call Shamburg & Cory's saloon, and there, according to the testimony of Stone, they drank a drink of whisky apiece and then got to shaking dice; that Chope, the deceased, shook dice for whisky and drank it, then witness shook dice with the barkeeper for whisky twice and each time lost, and, as he expresses it, "we got the whisky and drank it." To the question, "Did Chope drink it?" witness answered, "Of course he did." To the question, "State what Chope did with the whisky," he answered, "He drank the whisky, I lost it and had to pay for it."

The witness Boone Hawthorne stated that he was there in that saloon on that day, the 30th day of December, saw the deceased and Stone there. This witness called it "Reed's" saloon. In answer to the question whether or not that saloon was not called the Shamburg & Cory saloon; he answered, "Yes, I believe so." To the question what they, deceased and Stone, were doing there, he said "They had been throwing dice with the bar-tender, that they were throwing for the whisky or something." He stated that he didn't think Mr. Stone drank beer; couldn't say what Chope drank, but to the question "Did they take the drinks?" he answered, "Yes, I believe they did; they throwed again and Mr. Stone got beat again." Q. Then what did they do? A. They drank again, they then quit throwing. This the witness stated was the "West" saloon. To the question, "Did you see them before that?" he answered, "Yes, I did, they came out of Scott's saloon and went to Reed's saloon; don't know how long they were in Scott & Gorman's saloon; don't know when they went in; I saw them come out." To the question, "How many times did they drink in Shamburg's saloon while

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you were there?" the witness answered, "To the best of my recollection the young man drank three times, and the old man twice." To the question "Did you know what he drank each time?" he answered, "I couldn't say; they got the liquor of Mr. Reed; Reed was the bar-tender."

The witness William Kallen testified that he saw Chope and Stone on the 30th day of December, 1887, in what was known as Reed's saloon. To the question, "The old Cory & Shamburg saloon?" he answered, Yes, sir." To the question, "What did you see them do there?" he said, "He saw them at the bar taking drinks."

Q. Was this man Chope drinking?

A. Yes, sir.

Q. What kind of drinks?

A. I don't know.

Q. What kind of a glass?

A. A small glass.

Q. Larger or smaller than a whisky glass?

A. About the size of a whisky glass.

Q. Saw him take it off of the bar and drink it?

A. Yes, sir.

A. Norman was sworn and examined as a witness on the part of the plaintiff, and testified that he resides at Ord; is also acquainted with the plaintiff and is one of her attorneys; is also acquainted with the defendants R. M. Scott, Gorman, Cory & Shamburg, Hall, and Waff; is one of the attorneys in this case; that he has made an examination and search for the saloon bonds given by the defendants; that the examination he made was just a few days prior to the commencement of this action; that he went to Arcadia for the purpose of getting the bonds or copies of them; that he went to the party, Mr. Hall, supposing he was the clerk, but that he informed witness that he was not the clerk at that time, that he had resigned. This Mr. Hall is Edgar L. Hall, one of the parties to this suit; that Hall told witness that Mr. Rhittenmeyer (Christian name

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not remembered) was his successor; witness went to see Mr. Rhittenmeyer, but didn't find him; that then Mr. Hall told witness that the clerk didn't have the bonds; that the new clerk never had had the bonds; that when he resigned he turned the bonds over to Mr. Hastings, the treasurer; that after some little talk, he told witness, "that the boys were damn fools, or words to that effect, trying to play the bonds were gone." He says, "the bonds are here now and they are all right and are good bonds, and he says Mr. Hastings has the bonds and you go up there and tell him you want to see the bonds and you will get them." I asked him if he knew who the bondsmen were, and he said he did; he said, I am one of the bondsmen and the saloon-keepers are on each other's bonds. He went ahead and told me that Gorman was on Cory & Shamburg's bond, and Cory on Gorman's bond, and he told me he and Cory were on Scott & Gorman's bond, and John Wall and Scott were on Cory & Shamburg's bond. He said he and Cory were on the bond of Scott & Gorman. He further stated that he had quite a long talk with Mr. Hall, quite late; that he left there and didn't go to Mr. Hastings' that night; thinks that Mr. Hastings' store was closed.

This witness, upon being recalled for further examination, stated: "The next morning after I had the conversation with Mr. Hall I went to see Mr. Hastings and demanded the bonds. He informed me he had had the custody of the bonds; he said he would search. He took out some papers and pretended to make a search, and said they are not there. He said first one of the 'boys' and then another would come and take out the bonds and he didn't know who had them. And after that I went to see this man Rhittenmeyer, village clerk, in company with Mr. Babcock that was along; it was quite a while after that, immediately after the December term of court, I don't remember exactly the time. We went to the office of the village clerk and demanded the bonds, and also ex-

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amined the village clerk's record at that time of the approval of the bonds. He said he had never had the bonds. He said he didn't have the bonds—he had never seen the bonds. I did see the records; there was a record of the approval of the bonds, but no record of the bonds proper; only the approval of the bonds, at least I didn't see any." Witness is asked the question, "State what talk you had, if any, with Mr. Hall in reference to the signatures on the bond he signed." Over objection by the defendant which was overruled by the court, the witness answered, "I had a conversation, as I stated before, with Mr. Hall at Arcadia, in his drug store, in which he told me the names on the bonds; told me he and Mr. J. G. Cory were on the bond of Scott & Gorman, and he said Mr. Wall and Mr. Scott were on the bond of Cory & Shamburg, John Wall."

Upon cross-examination by counsel for defendants, this witness stated that he had an interest in the verdict in this case, the same as any attorney; that his interest was to the extent of his fees; that there was no stated contract between him and the plaintiff; that she said she had no money to prosecute the case, and she said she couldn't pay me any money, and she didn't know whether she would have enough to carry the case through or not; "and we talked the matter over, and talked about my taking the case and paying expenses and other counsel and taking half. There was no definite agreement as to what I was to get. I don't consider there was any binding contract one way or the other."

John Wall was called and sworn for the plaintiff. Stated that he was the party mentioned in the subpoena, Exhibit "C"; that he is the party that produced "those records before the court under that subpoena and brought the books to court here." To the question, "How did you get them?" he answered, "They were in my office; as commanded by the subpoena I brought them over."

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By the court: How did you come into possession of these books?

A. The village clerk was a partner of mine and in my office, and when he left, these books were left there.

Q. Did you know whether or not his successor has been appointed?

A. I do not.

Q. Has any one assumed authority as clerk on behalf of the village of Arcadia to take the records from your office?

A. They have not.

Q. They have been under your control since the clerk left them there, so that they were in the same condition as when he left them?

A. I was in the office and paid no attention to them. When I got the subpoena I went to the drawer and found the books there.

Q. Was the office of the village clerk in your office?

A. Yes, sir.

Q. That was his place of transacting business for the board?

A. Yes, sir.

By Mr. Robbins: Have you ever examined these records and papers?

A. Only in part.

Q. Do you know whether the bond of Scott & Gorman for 1887, and Cory & Shamburg for the same year (liquor bonds) are contained in these records?

A. I don't.

Q. Will you examine the records and ascertain?

A. I don't find them here.

Q. Do you know whether or not this record contains a record of the bonds?

A. I do not.

S. A. Hawthorne was sworn and examined as a witness on the part of the plaintiff. Resides at Arcadia, Valley

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county; resided there in 1887 and was one of the town board; knows that there were saloons opened under witness's administration in the year 1887; licenses taken out by two saloons that year; thinks licenses were issued in the names of Cory & Shamburg and Scott & Gorman; don't think there were any others; don't think there were any other parties licensed that year; one of the licenses was taken out when witness was not present, but don't think there was any but those two taken out that year; as a member of the town board witness would have known it if there had been; when the petition in one case was presented to the town board it was at Owens's harness shop; witness couldn't tell which bond or petition it was; George Cory's, one of the defendants in the case, name was on it.

Upon the cross-examination he stated that he didn't know whether his name was on the bond or on the petition; didn't know which it was; don't know whose bond or petition he signed; there was a record kept of it and that record isn't here; don't know where the record is; I think he took the record and skipped because his name was on the bond or petition, whatever that was.

Upon redirect examination, this witness stated that he remembers the conversation that took place at the time of the presenting of this bond, upon which Cory's name was as surety, in which witness told the balance of the board that he considered Cory's name good for the whole business.

On recross-examination he stated that this conversation was with Bert Charlton or Ed. Fuller; Ed. was chairman. That witness considered George Cory's name good for the necessary amount involved in the transaction, whether on bond or petition.

A. E. Charlton, a witness for the plaintiff, testified that he was a resident of Valley county; resides at Arcadia; resided there in 1887; was cashier of the First National Bank; in 1887 was on the village board; was present at

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some of the meetings of the board ; sometimes he was not present ; that there were two saloon licenses granted about the 1st of May, 1887 ; they were issued respectively to Scott & Gorman and Cory & Shamburg ; don't know that any other licenses were issued, but would know if there had been ; supposes that the firms that got the licenses gave bonds ; is satisfied in his own mind that both firms did ; the minutes of the meeting show that I was present when the bond of Scott & Gorman was approved ; don't believe the licenses specified what buildings these two firms were licensed to sell liquor in ; Scott & Gorman commenced selling liquor in the building where Jamieson has his saloon now ; Cory & Shamburg were where the meat shop is now, one building between the two buildings ; Scott & Gorman's is farthest east and Cory & Shamburg's farthest west ; don't know whether John Wall's name was on either of the bonds or not, neither can he swear whether J. G. Cory's name was on either of the bonds ; don't know whether Scott & Gorman were on Cory's bond, and don't know whether Cory was on Scott & Gorman's bond ; neither does he know whether Wall was on Scott's bond ; nor whether Wall was on Cory's bond.

Q. Was he on one of the bonds ?

A. Mr. Hall told me he was on Shamburg's bond ; from my own recollection I couldn't say whether he was or not. After the suit was commenced I went to his drug store to get some medicine and he told me he was on the bond but he didn't say which one he was on, and I never asked him.

Upon cross-examination, this witness testified that his place of business was just across the street from where these saloons were opened ; remembered the two buildings they were opened in ; that the Cory & Shamburg saloon was moved out of the building in which it was opened to the building on the east ; couldn't say who moved it ; couldn't say whether it was moved by one Reed or not ; couldn't tell when it was moved ; should judge it was

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along in the after part of the summer—possibly the fore part of the fall; couldn't say that he remembered when Cory & Shamburg stopped selling liquor; knew that they dissolved partnership but couldn't state when; if he remembers aright, it was in the fall or after part of the summer.

Upon redirect examination, this witness stated that he had been a member of the board ever since he came to Arcadia until this last election this year. He was then asked the question whether, as a member of the board, he ever knew of a saloon running there in Arcadia without any license.

Question by the court: Are you able to answer it yes or no?

A. I can't answer it yes or no, I will have to explain. I was told that a man—I was satisfied in my own mind that a man by the name of Reed had bought it and was running it without license.

Q. He had bought into what saloon?

A. In the first place he bought of Shamburg; that was the original Cory & Shamburg saloon he bought into.

Q. He ran that saloon, did he?

A. Yes, sir.

Q. Was that license you ordered issued to Cory & Shamburg, was that ever returned to the board and canceled?

A. Not that I recollect.

Q. As a member of the board, would you know if that license had ever been returned?

A. If I was present when returned I would be. If it had been returned when I was not there, very likely I would not know anything about it, our clerk's records ought to show it but I don't know whether it would or not.

Upon recross-examination he stated our clerk was very careless about keeping the record.

Q. Where is your clerk?

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A. He is gone.

Q. When did he leave Arcadia?

A. He left last summer.

On redirect examination this witness stated that he never heard of this license having been returned to the board.

W. S. Owens was called as a witness on the part of the plaintiff. Stated that he resides in Arcadia; business was that of a harness-maker; had lived there four years this spring; was one of the town board; was on the town board from the time the town was first incorporated until the year 1887; was a member of the town board the first of May, 1887, and until that time in 1888; that Cory & Shamburg as one firm and Scott & Gorman as another firm were licensed during the year 1887 or 1888, witness wouldn't be positive which; the time they were licensed witness was a member of the town board; there was no others issued after that that witness knows of; couldn't tell who were the bondsmen on either of the bonds. To the question, "Was John Wall one of the bondsmen?" he answered, "I don't know for certain; I hardly think he was; I think he was objected to, whoever the parties were—the parties giving it; I think John Wall was objected to, as he was on some other bonds." To the question, "Was J. G. Cory on one of those bonds?" he answered, "He was an applicant." To the question repeated he stated, "I can't tell you; I suppose—." To the direct question, "Wasn't J. G. Cory one of the bondsmen for Scott & Gorman?" he answered, "I couldn't tell you; I don't recollect who the bondsmen were; I wouldn't swear that he was or was not; I have no recollection about it." To the question, "Was R. M. Scott one of the bondsmen for Cory & Shamburg?" he answered, "I couldn't tell you that." The same answer as to John Gorman, whether he was bondsman for Cory & Shamburg. To the question, "Was Edgar L. Hall one of the bondsmen for Shamburg & Cory?" he answered, "I think Edgar L. Hall told me

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one time he was on one of the bonds." To the question, "Was John Wall one of the bondsmen for Shamburg & Cory?" he answered, "I couldn't tell you." To the question, "Do you swear he wasn't?" he says, "I couldn't tell you." Does not recollect of being present at the time of the approval of the bond of Scott & Gorman; has no recollection of the approval of any bonds; don't know of any bonds being given; I think we issued two licenses, Scott & Gorman's and Cory & Shamburg's.

Upon cross-examination he stated that there was one time that was brought up, he, John Wall, was objected to and they were required to get somebody else.

Q. Don't you remember it was because Wall was on the treasurer's bond of the village?

A. I don't think it was a liquor bond.

Certain pages of the minute book of the village of Arcadia for the year 1887 were offered and received in evidence, showing that at a regular meeting held on the 2d day of May, 1887, there were present, Owen, Hawthorn, Hastings, Charlton. Fuller in the chair. The minutes of last meeting were read and approved. Application of Cory & Shamburg for saloon license for the year ending the first Tuesday in May, 1888, accompanied by bond and petition. Motion by Charlton that bond be accepted, and the clerk be instructed to issue license when the money is paid into the treasury. Carried, etc. Attest, E. L. Hall, clerk. Also of the regular meeting of said board on the 20th day of May, 1887. Present, Owen, Hastings, Fuller. Fuller in the chair. After other business application of Scott & Gorman, accompanied by bond and petition, for saloon license. On motion of Mr. Charlton, the bond is approved and the clerk ordered to issue the license when \$750 is paid into the village treasury. After other business adjourned. Attest, E. L. Hall, village clerk.

Frank Moses was called as a witness on the part of the defense. Stated that he had met the deceased to know him

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three times; that he saw his body after his death; first saw it at Cummings' shanty; that he acted as one of the coroner's jury at the inquest held upon his dead body; that he had known the witness Stone for about five years; lived in the same neighborhood with him; heard his testimony at the coroner's inquest; that he stated in his testimony as to the amount of liquor drank by the deceased; that it was one glass of beer and two of whisky, or it might have been one of whisky and two of beer; that that was all that he (witness Stone) knew of the man drinking, if he drank any more he didn't see him do it; that he (witness) examined the dead body of the deceased at the time of the inquest; that the body was stripped and examined, and it was found that his chest here (indicating) not frozen; his right arm we could raise it so, like that (indicating), and this arm (indicating) was just in this shape (indicating), and his teeth set perfectly tight; that while witness might have been mistaken as to the exact spot, "we found, I think, on the left of the back bone, pretty near the shoulder blade, a spot, as near as I can remember, the size of a silver dollar, dark purple; I called the attention of the doctor to it, and he said it was undoubtedly caused by tipping over. Then we found a mark on the right eye, this bone (indicating), so I took two nails out of my pocket and placed it right down in there. I wasn't satisfied with that and I called in witnesses who knew the gentleman before to see if it was natural. We then found a scar, I won't be positive which side it was on, I think the left side, laying, I should judge in that shape, a little scar about as wide as my two fingers, which was not colored at all, and those who knew him before said it wasn't natural at all; this was in the left ear. That is all the marks we found on him, except his overcoat was badly torn on the back. There was ice in his hand so that I could take the arm and shake it. I asked the doctor if I could dig it out; and there was ice in both ears, and we dug it out. There was

ice over his face three-quarters of an inch thick. I believe that is all I can recollect." That the witness George Stone testified that he took his feet and kicked snow in the poor fellow's face, "I asked him what he did that for," and he told me "to keep the wind out of his face." He claimed he took the cap because he had not been—what excuse he gave for it I don't remember; I know we blamed him at the time, and he said he was sorry he did it, it wouldn't do him any more good, the witness was bareheaded himself, and he took it. He said when he left him he was past all help, he spoke to him and he didn't answer. I believe that is all about his being dead. Some of them asked him when he left him (whether he left him), and he said he was past all help; he spoke to him and he didn't answer. I don't remember whether he said he was dead or wasn't dead; he said he was past all help.

This witness further testified that he saw the witness Stone and deceased at Arcadia on the 30th of December, 1887; that he spoke to and shook hands with them and spoke to them about going home; one of them said "All right, we will go in a few minutes." That witness didn't suppose he had been "drinking a drop."

There was some evidence given by the other witnesses, of the marks appearing on the person of the deceased at the time of the inquest, and which is not deemed necessary to copy here.

William Cory was sworn and examined as a witness for the defense. Stated that he was one of the defendants in the case; resides in Arcadia; had lived there about a year; resided in Valley county since 1883; was engaged in keeping a butcher shop; in the months of May and June, 1887, he was a partner in a saloon in Arcadia; that his partner was William Shamburg; the style of the firm was Shamburg & Cory; continued in the saloon business under the partnership of Shamburg & Cory from the 3d or 4th day of May until the 6th of July of the same year,

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then sold his business to Shamburg and witness went on a farm; that he lived on a farm all the time; didn't move into Arcadia at the time; about the month of August, William Shamburg informed him (witness) that he had sold the saloon business to Mr. Clark; that witness objected to Mr. Clark running the saloon under that license; that Mr. Clark came to witness and wanted to know if he couldn't run and I said "No;" Mr. Shamburg took said license down from the wall and said he didn't care, and handed it to me and I took that to Mr. Hall, and told him I wouldn't allow that man to run a saloon under my license; I gave it to Mr. Hall and told him to cancel it; Mr. Hall was at that time clerk of the villiage of Arcadia; that he don't know where Hall is now; that witness is acquainted with George Stone, one of the witnesses who testified in this case, or rather had seen him, was not acquainted with him; never saw William Chope, the deceased, in his lifetime; that he didn't sell any liquor to George Stone or William Chope on the 30th day of December, 1887; that he was not engaged in the saloon business or otherwise at that time; that he had no interest in any saloon or in the saloon he had formerly been connected with in the village of Arcadia on the 30th of December, 1887; that he knows only by hearsay that after Clark's administration of the saloon, the saloon was sold to and run by a man by the name of Reed; don't know his Christian name; don't know when Reed took possession; that he continued to occupy the building until the first of March, 1888; that himself and Shamburg dissolved partnership and published a notice of dissolution in the *Arcadia Courier*; the notice was published for four or five issues; that the firm was dissolved on the 6th of July, 1887; that his last connection with the business was on the 6th of July, 1887.

Upon cross-examination, among other things, witness testified that his partner, Shamburg, as consideration for the said saloon business, gave him a pair of mules—

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"he gave me the mules and I left him have what there was."

Q. The license money and everything else?

A. Yes, sir.

Q. And Shamburg continued to run right along under the old license?

A. He did right along until August.

Q. And you knew he was running along under the old license?

A. I knew he was running.

Q. Whereabouts did he run?

A. Shamburg continued to run in the same building; the buildings were changed afterwards. I don't know when they changed. I suppose I could find out.

That witness never took the license to the board while in session; never requested the board of trustees of the village of Arcadia while in session to cancel the license.

Q. How far did they move that saloon?

A. In the same block.

Q. I will ask you if it was not right out of one room into another in the same building?

A. Yes, sir.

William Shamburg was called and sworn on the part of the defense. Resides at Ashton, Custer county; had lived in Valley county, at North Loup and Arcadia; that he did a saloon business in the village of Arcadia from the first of May to the middle of October; was in partnership with John G. Cory; the style of the firm he didn't remember, whether it was Shamburg & Cory or Cory & Shamburg; the partnership was formed the first of May; formed to keep a saloon in Arcadia; the partnership continued until sometime after the 4th of July when they quit and witness ran on himself; ran a couple of months, along there. He then sold it to William Clark and was to get \$800; took a farm as part consideration from Clark for the saloon; Clark continued to operate the saloon about six weeks then Mr. Reed took it—took it from Clark; Mr. Reed

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came up there, the saloon was closed, wasn't running, and he came to me and asked me if I owned the saloon, and I made arrangements with Mr. Clark and Mr. Reed so Mr. Reed got the stuff. It was close to ten days or two weeks when the transfer was made. I got the consideration from Reed; I got four horses, two buggies, and two sets of harness and Mr. Clark got the colt.

Q. What, if anything, was done with the license that had been issued to the firm of Shamburg & Cory?

A. Cory came in there and he was tearing around about the license, and I gave it to him; Cory started to take it down to Hall; Hall was one of the town officers; don't know what town office he held. The partnership formed between Shamburg & Cory was dissolved some time in July, after the 4th; it was dissolved by mutual agreement, and a notice of the dissolution was published in the *Arcadia Courier*; don't know for how long; Cory got it put in the paper; that he was not keeping a saloon in the month of December, 1887; didn't sell any liquors to William Chope, the deceased, husband to the plaintiff in this case, in the month of December, 1887; had no interest in the saloon that Shamburg & Cory had formerly kept at that time. After the selling by witness to Reed of the saloon and fixtures, the stuff was put in the other building—the east building—by Mr. Reed. I think it was moved the time of the fair in Loup; can't remember the day and date; it was in the fall of 1887.

Upon cross-examination this witness stated that he never went to the village board of trustees while they were in session and asked to have the license canceled.

C. D. Crane was sworn and examined as a witness for the defense, and stated that he was the publisher of the *Arcadia Courier*, and that he had in his possession and presented to the court a copy of that paper published in the months of July and August of that year. A copy of the notice was introduced and put in the record as an exhibit.

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John Wall was called and examined as a witness on the part of the defense. Among other things, not deemed necessary to introduce here, witness testified as follows:

Q. You may now state, Mr. Wall, whether or not you signed the bond of Shamburg & Cory sued on in this case.

A. I have no recollection of signing the bond for Shamburg & Cory or for Scott.

Q. Do you know anything about the closing up of Clark's saloon while Clark was running it?

A. I do.

Q. State what you know about that fact, Mr. Wall.

A. I had a bill from some eastern firm, I don't know what firm, for collection against Clark; I went down and closed Mr. Clark up, and I was going to attach the stuff—Mr. Clark turned over the keys and I locked up the building and kept it locked about six weeks.

Q. State what happened after that.

A. Mr. Shamburg and Reed made a deal and in that deal my money was paid to me, I think Mr. Reed and Shamburg were together when it was paid in my office. Clark and Shamburg came to me. Mr. Clark had bought Mr. Shamburg out; I drew the notes and a deed Mr. Clark had, a deed from Mrs. Nelson to him. He wanted to transfer that to Mr. Shamburg in such a way that Clark would not be liable. I went with Mr. Clark over to Mrs. Nelson's and had the deed made direct to Shamburg, the same deed offered in evidence to-day.

Q. State what followed after that, who ran the saloon and how long they run it.

A. Mr. Reed ran it from that time until the next spring.

Q. Whereabouts did he run it?

A. He moved it out of the building; there were two buildings, one built up beside the other, and he moved it over from the one to the other, one building further east than the other.

A. A. Laverty was called and examined as a witness

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for the defense. He is county judge of Valley county; has some of his dockets with him; has the files of the case of the State of Nebraska against Charles Reed. (Defendant here placed in evidence a certified copy of page 4 of the criminal docket, number 1, county judge's office, county of Valley.) It is here admitted that the Charles Reed referred to in the complaint and record read is the same Charles Reed referred to in the testimony of William Shamburg, John Wall, and Mr. Cory as keeping the saloon in Arcadia. The papers referred to appeared in the transcript as an exhibit, and consists of the information of of R. C. Nicholls against Charles Reed as a vendor of malt, spirituous, and vinous liquors, etc., having unlawfully kept the windows and doors of his place of business obstructed by certain articles known as curtains; the warrant for the arrest of Charles Reed, and the docket entry contained the plea of guilty of Charles Reed to the complaint and his conviction of the offense charged, and the assessment of a fine of \$25 and costs or five days against Charles Reed.

R. M. Scott was called and examined as witness for defense. Testified that he resides in Arcadia and had lived there about four years; that his business is real estate and insurance; that in 1887 he was in the saloon business in partnership with J. G. Gorman; the style of the firm was Scott & Gorman; that he is not acquainted with the witness George Stone, but has seen him a few times; never saw the deceased, William Chope, in his lifetime; that on the 30th day of December, 1887, he did not sell any liquors to either George Stone or William Chope; that up to 2 o'clock, or about that time, he was in the back part of his saloon in the back room; that A. B. Jamieson was barkeeper at the time; that his partner is now in Washington territory; witness heard the testimony of Mr. Norman, one of the attorneys for the plaintiff in this case, in regard to witness being on the saloon bond of Shamburg

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& Cory; that to witness's recollection he never signed said bond; that they asked him to, and that he told them he was going into the same business and couldn't sign it; don't recollect which one asked him; don't know much about the sale of the saloon owned by Shamburg & Cory; that Reed told him one day he was going into the saloon business next day, and that he did go into the saloon business the next day and continued in it until the first day of the following May; that he moved the saloon formerly occupied by Cory & Shamburg; Cory wasn't there after the first part of July, and Shamburg left afterwards; that Shamburg sold his interest to Reed for some horses and buggies.

A. B. Jamieson was called and examined as a witness on the part of the defendants. Stated that he lived in Arcadia; had resided there for the last five years, and was at the present time assessor of the township; was a single man; was engaged in the saloon business in the month of December, 1887; was tending bar for Scott & Gorman in Arcadia; had seen the witness George Stone; had also seen William Chope, the deceased; first saw them in Scott & Gorman's saloon on the 30th day of December, 1887, at between 1 and 2 o'clock in the afternoon. Witness was at that time tending bar; besides them and himself there were in the saloon at that time Mr. Gorman, Mr. Scott, Mr. McCord, John Reed, and several others whom the witness cannot remember at this time. Chope and Stone came into the saloon. Chope came in first; Mr. Chope went into the office inside of the saloon on the west side; the office is about twelve feet north and south and eight feet east and west, and at that time Mr. Gorman was sitting in the office when these two strangers came in; the first time witness ever saw either of them; that the younger of the two walked up to the railing and entered into a conversation with Mr. Gorman; witness didn't hear what he said, then being waiting on people; he then went towards the

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south end of the bar and heard them talking something about renting a piece of land, or selling it; witness didn't pay any attention to that because Mr. Gorman had been wanting to sell his farm ever since he had been in the business, over a year; that they talked there probably twenty minutes to half an hour, and both men went out, and witness didn't see them again, either of them; that the farm Gorman referred to, is about four miles north of Arcadia; witness don't know how far from Stone's house, as he don't know where Stone lived; that neither one took a drink in that saloon that day; they were in there but once; that witness heard of the death of Mr. Chope the day following; heard it from Mr. Gorman.

The first four paragraphs of the instruction given by the court on its own motion are unexcepted to and therefore are not copied here. The remaining five which were excepted to by the defendants I copy here:

"5. You are instructed that if from the evidence you should find that the deceased, William Chope, came to his death by freezing, or by other means, on the night of December 30, 1887, and that such death was caused or contributed to in any manner by intoxicating liquors, and that any of the defendants, personally or through their agents, furnished him any intoxicating liquors on that day which contributed to such result, then, and in that case, all the defendants furnishing intoxicating liquors would be jointly liable in damages to the plaintiff; and if you further find that any of the defendants sued as bondsmen were upon the bonds of the parties so furnishing, then, and in that case, such bondsmen would be jointly liable.

"6. You are further instructed that if you should find from the evidence that the deceased came to his death by violence inflicted by any other person, and should further find that the person inflicting the violence was intoxicated at the time and that he obtained the liquors which caused his intoxication from the defendants, or either of them,

and that he would not have used the violence that caused the death except as a result of such intoxication, then, and in that case, such of the defendants and their bondsmen as furnished such intoxicating liquors would be equally liable.

"7. You are instructed that an individual or partnership taking out a license for the sale of intoxicating liquors cannot sell and transfer that license to another person or party; and if they do sell and transfer their business, together with their rights under the license, the purchaser would be holden to be their agent and they would be liable for all sales made by him under and by virtue of license. And if the bondsmen of such license-holder knew of such sale and transfer and take no steps to relieve themselves from liability, their liability will continue.

"8. You are further instructed that it would be the duty of a person going out of the saloon business, selling and transferring his property, to return his license under which he was transacting business to the authority granting the license and have the same canceled, and if he did not do this, that he would be held liable for all damages accruing as the result of the sales of intoxicating liquors by his successor in business.

"9. You are instructed that the amount of a sale is not material, nor is it material that the sale should be the one which produced the final intoxication; but the saloon-keeper or the person furnishing intoxicating liquors is responsible for all damages which may accrue as the result of his sales, if a person obtains but one drink and then drinks at other places sufficient to intoxicate him. And if the death is established as a result of sales by more than one person, you are not required to find which one furnished the liquor that caused the death."

The three paragraphs of instruction given by the court at the request of the plaintiff, to which the defendants excepted, are as follows:

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"1. The jury are instructed that every material allegation in the petition not controverted and denied in the answer are to be taken as true; and further, that the allegation in the petition that the defendant John G. Cory signed the bond of Scott & Gorman is not controverted or denied in the answer, and therefore is to be taken as true.

"2. The court instructs the jury that if from the evidence they believe that the said William Chope was, at the time he upset and overturned his sled and lost his team, intoxicated, and that the defendants sold any part of the liquors that produced such intoxication, and that he upset his sled and lost his team in consequence of such intoxication, and that in endeavoring to reach home on foot became exhausted, and that such exhaustion was caused by reason of his being compelled to walk, and that he was unable to reach home and was frozen to death, the defendants would be liable.

"3. You are instructed that whatever the fatal cause was of the death of the said William Chope, if it was inspired or contributed to by the state of intoxication caused in whole or in part by said traffic of the defendants and the sale or giving to the said William Chope intoxicating liquors, then the defendants would be liable."

The following four paragraphs of instruction asked for by defendants and refused by the court, and such refusal excepted to by the defendants, are as follows:

"1. The jury are instructed that in order to justify a verdict for the plaintiff against any of the defendants, they must first find that the death of William Chope was caused by the drinking of the liquors furnished by the defendants or some of them, but if you find that whisky was furnished by more than one defendant, you are not required to find which one furnished the liquors that caused the death.

"2. You are further instructed that a party who procures a license to sell liquors may cease selling at any time

he may choose to do so, and sell his liquors or saloon furniture to any person he may choose, and that he is under no legal or moral obligation to see to it that the purchaser thereafter complies with the law and procures a license any more than any other citizen, and that if such a party does cease selling, neither he nor his bondsmen can be held liable for any act or default of the person who thereafter operates such saloon.

"3. You are instructed that if you find that Cory & Shamburg dissolved their partnership in good faith, one of them retiring, that such dissolution would relieve the bondsmen of the firm of Cory & Shamburg from further liability for the partner remaining in business unless such bondsmen consented thereto and new license was procured.

"4. The jury are also instructed that bondsmen of persons engaged in selling liquors are under no more obligation than any other citizen to see that purchasers from his principal comply with the law and procure a new license or give new bonds."

It appears from the record that at the close of the trial the court directed the jury that as he was about to adjourn court until the following morning, it being then late in the night, that should they agree upon a verdict at any time during the night, that their foreman should sign such verdict and seal it up in the envelope which the court then handed to them, he first signing such verdict in their presence, and take it into his custody; that they then could separate and come in a body into court at 9 o'clock the next morning. The court also admonished the jury that a verdict of agreeing not to agree is not a verdict; that they must first agree upon a verdict as to the merits before they would be allowed to separate; that the jury then retired in charge of the sheriff, and on the 18th day of June, 1889, the day following, said jury came into court in a body with their sealed verdict in words and figures as follows, to-wit:

"We, the jury sworn and impaneled in the above entitled cause, do find for the plaintiff, against the defendants R. M. Scott, John G. Cory, John Gorman, and William Shamburg in the sum of \$6,000, and against John Wall and Edgar L. Hall in the sum of \$1,000, jointly with the above defendants."

Whereupon the court refused to receive said verdict but directed the jurors to retire and reform their said verdict, at the same time instructing the jury as follows:

"In this case, if the defendants Wall and Hall are liable at all, they are liable as bondsmen, and if their principals are liable in an amount equal to or greater than the amount of the bond, \$5,000, then their bondsmen would be liable in the amount of \$5,000 or not at all, so you will return and reform your verdict."

To which instruction the defendants then and there excepted. Thereupon the jury again retired to reform their verdict. And afterwards the following questions by the jury, marked Exhibit "D," were handed the court by the officer in charge:

"To the Hon. Judge: If we find the damages \$7,000, and put the \$7,000 against R. M. Scott, John G. Gorman, John G. Cory, and William Shamburg, and \$5,000 against John Wall and Edgar L. Hall, will that be right?"

Whereupon the jury was again called and instructed by the court as follows:

"This verdict, gentlemen of the jury, was returned to you for the purpose of having you make corrections in it so that it could conform to the law. I don't know what you mean by this question unless you have in your minds the idea that the sum total of the two findings would be the judgment. That is not the law. Each one of these parties, if liable at all, or any of them are liable for the whole amount of the verdict that would be the judgment, except the bondsmen, cannot be found liable for an amount in excess of the conditions of the bond. If there was a

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bond given for \$5,000 they cannot be found liable for a greater amount than that, but if you find the principals to be liable for damages equal to or in excess of the \$5,000, then the bondsmen are with them jointly liable to the amount of \$5,000. In reforming your verdict, the amount you find as damages against the principals needed no change whatever, it simply needed changing as to the bondsmen, who, if they were liable at all, were liable to the full amount of their bond for \$5,000. But I could not, and would not render a judgment for the sum of the two findings. Your first finding needs no change under the instruction of the court, but the last finding should be made to conform to the first. It is not the total of the two. The question was presented to you as to whether or not the defendants Wall and Hall had signed any bond under which damages had been incurred. If you find that they signed a bond and that damages have been sustained, and that the damages as far as the principals for whom they signed amounted to \$5,000 or more, then they were liable for \$5,000 or not at all.

"Question by juror: If we change the \$1,000 to \$5,000 will that be correct?

"Answer by the court: Yes.

"The above instruction marked No. 'B' was given after the jury had been called into court subsequent to their being sent out to reform their verdict. The jury having sent to the court the written request attached hereto and marked Exhibit 'D.' F. B. TIFFANY, *Judge.*"

"And now on the 18th day of June the jury returns into open court their verdict as follows:

"In the District Court in and for Valley County, Nebraska.

"EMMA CHOPE	}
V.	
R. M. SCOTT, JOHN G. GORMAN, JOHN G.	
CORY, WILLIAM SHAMBURG, JOHN	
WALL, AND EDGAR L. HALL.	

"We the jury sworn and impaneled in the above enti-

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tled cause do find for the plaintiff and against the defendants R. M. Scott, John G. Cory, John C. Gorman, and William Shamburg in the sum of \$7,000, and against John Wall and Edgar L. Hall in the sum of \$5,000 jointly with the above defendants.

"J. V. JOHNSON,
"Foreman."

The following examinations of the juror Timmerman is here copied from the bill of exceptions:

Juror Timmerman challenged by defense. Examined by the court.

Q. Have you any bias or prejudice against the saloon business, or against men engaged in that business in any capacity, as would preclude your giving their testimony the same weight and consideration as you would the same men if they were engaged in other business?

A. No, sir.

Q. Have you any bias or prejudice against the business or men engaged in it so that you could not give to their testimony due consideration and weight, the same as you would any other men?

A. No, sir.

Q. Would you pass upon their testimony, considering only whatever interest they might have in the result of the suit or relationship to the parties the same as you would any other witness?

A. Yes, sir.

ABBOTT: Q. I believe you said at the time you read this article you saw in the paper you had never heard it disputed, the facts as you saw them there?

A. No, sir.

Q. Did this article you saw in the paper tell the facts and circumstances with the names and date?

A. I don't know as it stated the whole facts. I think it stated the cause of his death from liquor or something of the kind.

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Q. You believed the reports as you read them ?

A. I naturally would.

Q. If this action brought to recover for the death of the man and the reports are true, then you had an opinion as to which party ought to recover?

A. Yes, sir.

Q. And it would take a little evidence to get it out of your mind wouldn't it? Can you get it out of your mind enough to be able to start even?

A. I don't think I would be prejudiced.

Q. I want to take the case as it stands to-day; you believed it then, never heard it disputed, wouldn't it take some evidence to make you believe the other way.

COURT: Q. Do you know anything about the facts except that what you read in the newspaper?

A. No, sir.

Q. From what you read in the newspaper did you form or express any opinion as to whether or not the plaintiff in this case ought to recover, and if so, how much?

A. No, sir.

Q. Have you any opinion now as to whether she should recover?

A. I don't know but what I would have.

Q. Is that opinion such a one as would influence you in the jury room after you heard the testimony?

A. No, sir.

Q. You would be able to listen to the testimony as given to the court, and under the instructions of the court render a fair and impartial verdict in the matter?

A. Yes, sir.

Challenged by defense.

Challenge overruled. Defense excepts.

Second juror Timmerman challenged by defense. Examined by Abbott:

Q. Have you any prejudice against men engaged in the business of keeping saloons?

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A. I look at it like this: if the law gives him the privilege it is an honorable business.

Q. Would you take his word as soon as anybody else's?

A. No, sir.

Q. Are you a member of any organization which has for its object the suppression of the sale of intoxicating liquors?

A. Yes, sir.

Juror challenged by defense.

COURT: Q. Is that organization political in its nature or a secret society?

A. Political.

Q. Would your connection with that organization and your interest in it be such as would prejudice you against a man engaged in the traffic of intoxicating liquors to that extent that you would not give his testimony the same weight as other men?

A. No, sir, it would not.

Q. Would you be able to listen to the testimony upon oath of a man engaged in the liquor traffic, and interested in the result of the suit, and give it the same weight as you would the same man if he was in other business and interested to the same extent?

A. The same weight.

Q. Wouldn't allow the fact of his being engaged in the liquor traffic to influence you?

A. No, sir.

Challenge overruled. Defense excepts.

Neither the first, second, third, fourth, or fifth assignments will be examined specifically. They will doubtless arise in the discussion of other assignments, and, if necessary, attention will be paid to them at the close of this opinion.

The sixth assignment of error is based upon the refusal of the court to give the first, second, and third paragraphs of instruction asked for by the defendants. I confess my

inability to conceive the reason why the court refused to give the first of this series, unless it was that the substance of it had been already given in those given by the court on its own motion, and it is true that the whole of the substance of said paragraph was given except possibly, the last clause, to the effect, that in a certain event the jury were not required to find which one of the defendants furnished the liquors that caused the death. The refusal to give this clause or sentence by the court was not prejudicial to the defendants. As applicable to the evidence in this case, the second and third paragraphs of this series ought to have been given. The evidence in the case is to the effect that Cory & Shamburg, as copartners, took out a license to sell intoxicating liquors in the village of Arcadia for one year from the first or second of May, 1887; that they continued that business until on or about the sixth day of July, when Cory sold out his interest to Shamburg, which sale, although the evidence is not absolutely clear on that subject, must be held to have been of all his rights and privileges under the license as well as his property interest in the stock in trade and fixtures; that notice of this sale was publicly given and that it was quite generally known in the community. Cory ceased to have any other connection with the business whatever. That after about a month, Shamburg also sold his interest in the property and stock in trade to a Mr. Clark. What the understanding between Shamburg and Clark was, as to whether Clark would have a right to sell intoxicating liquors under the original Cory & Shamburg license, does not appear, but it does appear that Mr. Cory objected to Clark's selling under that license, and upon making his objection known to Shamburg the latter gave up the license and it was carried to the office of the city clerk and given up to him by Mr. Cory. Now there can be no doubt of the right of Cory to sell out his interest in the liquors and other real property to Shamburg. Whether he had the right to sell his interest in the

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license so as to discharge himself of any liability for the manner in which the saloon business should thereafter be conducted by Shamburg, not being involved in this case, will not be considered, but there can be no doubt that after this sale Shamburg had the right to continue to sell under that license and was responsible for the manner in which he conducted such business, as were also the bondsmen of Cory & Shamburg for the manner in which he conducted that business according to the conditions of the bond. It is equally clear that it was incompetent for Shamburg to sell any right under the license to Mr. Clark, but it is also clear that he did have the right to sell to him the saloon property, etc., formerly held by Cory & Shamburg and Cory's interest in which had been sold to Shamburg. And I am quite satisfied myself that in such case, if the sale was made in good faith and was not colorable, that upon such sale being made, and Clark entering into the possession of the premises, especially when the Cory & Shamburg license was taken down from the wall by Mr. Shamburg and delivered to Mr. Cory, and carried by him and delivered to the village clerk, that all liability of the licensees Cory & Shamburg, or of Shamburg individually, to the public, as to the manner in which the saloon business should be carried on in that place, either by Mr. Clark or anybody else, absolutely ceases. I have read with interest the argument of counsel in which they urge the contrary and claim that the language of our statute at section 5, page 554 of the Statutes of 1889, as follows: "The license shall state the time for which it is granted which shall not exceed one year; the place where the liquor is to be sold, and shall not be transferable;" in effect imposes a kind of legal trust upon the licensee as well as his securities under the liquor law which would render them liable and responsible for the manner in which the saloon business is carried on at the place specified for the entire year. This language of the statute I understand to mean, first, that licenses

shall not be issued for a less time than one year; second, that each license shall clearly designate the place where the authority of selling liquor under it is to be exercised, and thus give no licensed person the right or power to move his saloon from one point to another; and thirdly, that it shall confer no right, power or authority upon any licensed person to sell out his license to another person thereby conferring any right of privilege upon him. It may be granted that where a person licensed to sell intoxicating liquors sells out his saloon property and fixtures to another person and without giving notice to the proper authorities, and especially for the purpose of shielding the persons to whom he sells from the necessity of procuring a license, conceals the fact that there has been a sale and transfer, he would be held liable for the damages caused by the sale or giving away of liquors by his purchaser, but that is not this case.

The court was doubtless right in refusing to give the third paragraph of this series in the shape in which it appears in the record. It is certainly not the law that, upon the dissolution of the partnership of Cory & Shamburg, in ever so good faith, and the retiring of Mr. Cory from the firm, their bondsmen were relieved from further liability for the partner remaining in business unless such bondsmen consented thereto and new license procured, whatever the meaning of the draftsman of that paragraph was.

The fourth assignment of error is based upon the giving of the sixth paragraph of the instructions given by the court upon its own motion. In considering this assignment it will be remembered that the plaintiff, by her petition, alleged that on the 30th or 31st days of December, 1887, the deceased, William Chope, obtained liquors from the defendants, naming the principal defendants and setting out who their bondsmen were, which liquor he drank and thereby became intoxicated, and that in said drunken

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and intoxicated state and condition, said William Chope started for his home, and being in such drunken and stupefied condition, was unable to drive his team; that it was in the night-time, the night exceedingly cold and stormy, and by reason of his said condition and the loss of his team, the said William Chope, becoming unable to travel on foot, and hence unable to reach his home or obtain other shelter, froze to death. By the instruction we are now considering, the court tells the jury that if they shall find from the evidence that the deceased came to his death by violence inflicted by any other person, and should further find that the person inflicting the violence was intoxicated at the time, and that he obtained the liquors which caused his intoxication from the defendants, or either of them, and that he would not have used the violence that caused the death except as the result of such intoxication, then the jury should find for the plaintiff and against such of the defendants and their bondsmen as furnished such intoxicating liquors.

Some slight evidence had been introduced on the part of the defendants, the object of which evidently was to disprove the evidence of plaintiff that the deceased, William Chope, came to his death by freezing, caused by exposure and intoxication. It can scarcely be said that this evidence was inadmissible by reason of no foundation having been laid for it in either of the answers. Its object and purpose was not so much to establish a positive theory of the death of Chope, as to disprove and weaken the plaintiff's theory. This evidence, slight as it was, was doubtless conceived by the trial court to be a reason for giving the above instruction. The witness George Stone was the only human being known or believed to have been with the deceased at or near the time of his death. If he received any violent treatment from any human being which could have contributed to his death, it was from Stone. There was evidence in the case, both from Stone himself and many

other witnesses, that he at or about that time was to some extent intoxicated, and that the liquor which produced this intoxication was obtained from the same parties and at the same time that Chope procured the liquor which produced his intoxication. Now if it was true that after these two men became intoxicated at the saloons in Arcadia, as we have seen, and while in such state of intoxication Stone had set upon Chope and caused his death by violence, it cannot be doubted, under the decisions of this and other courts, that, upon proper allegations and proof, the widow and infant child of Chope would have had the same cause of action against the saloon-keepers, who furnished the intoxicating liquors which intoxicated the one, to a condition causing him to use violence upon his friend and son-in-law, and upon the other sufficient to make him the easy victim of such violence. Certainly there cannot in view of the case of *McClay v. Worrall*, 18 Neb., 52.

While, as above stated, I do not think the evidence on the part of the defense of any violence to the person of Chope sufficient to render it necessary upon the part of the court to give the said instruction, yet, after having produced the evidence, such as it was, I do not think that the defendants can object to the court having probably misconceived the weight of it and considered it necessary to place it before the jury in the shape of an instruction. Neither can I conceive that it could have misled the jury.

The eighth assignment of error is based upon the giving of the seventh instruction.

The court in this instruction first tells the jury that an individual or partnership having taken out license for the sale of intoxicating liquors, cannot sell and transfer that license to another person or party. This is clearly correct but the court continues: "And if they do sell and transfer their business, together with their rights under the license, the purchaser would be holden to be their agent and they would be liable for all sales made by them under and by

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virtue of such license." This, I think, would depend upon the fact of whether the alleged sale was made openly, honestly, and in good faith, or was merely a colorable transaction for the purpose of carrying on the business and avoiding the responsibility which the law has fixed upon licensed persons. I do not quite agree with the logic contained in the court's expression declaring that a licensed person cannot transfer his license, and again, that if he does transfer it that the person to whom it is transferred becomes his agent. The court continues: "And if the bondsmen of such license holder knew of such sale and transfer and took no steps to relieve themselves from liability, their liability will continue."

It may be sufficient for the purpose of this case to say that, according to the evidence, long before the sale of the liquors which it is claimed caused the death of plaintiff's husband, one of the licenses in the case, and the only one to which the doctrine of the instruction can possibly apply, had been surrendered up to the village authorities.

The ninth assignment arises upon the giving of the eighth paragraph of instruction. All that has been said under the last head in reference to the evidence in the case is equally applicable to this point. I am not prepared to say, nor do I know of any law or authority to the effect that a licensed person desiring to go out of the saloon business and selling and transferring his fixtures and stock in trade to another person, is obliged to return his license under which he was transacting business to the authority granting it and have the same canceled, under the penalty of being liable for all damages accruing as a result of the sale of intoxicating liquors by the person to whom he had sold his saloon property. But doubtless if in such case the sale was merely colorable, and the person selling out knowingly allowed his successor to do business under his license, I think that his liability would continue. The case, however, is entirely hypothetical and not applicable to any view of the evidence in this case.

The tenth assignment arises upon the giving of the fifth paragraph of instructions given by the court at the request of the plaintiff, and the eleventh upon the giving of instruction number six. These two paragraphs of instructions are neither of them contained in the record, nor is any reference made in any of the briefs to their omission.

The twelfth assignment arises upon the admitting by the court in evidence upon the trial of the minute book and records of the village of Arcadia. These records show the proceedings of the village board of Arcadia at its meeting held March 20, 1887, showing the amendment of the ordinance for the granting of licenses to sell intoxicating liquors by raising the amount to be paid for such licenses to \$750, and providing that no such license should issue in any case until the payment of such sum, whereupon such license should issue to the applicant, to be signed by the chairman and attested by the clerk. Also showing the application of Scott & Gorman for saloon license accompanied by bond and petition and the approval of the bond and license ordered issued upon the payment of \$750. Also the proceedings of said board for May 2, 1887, showing the application of Cory & Shamburg for saloon license for the year ending the first Tuesday of May, 1888, accompanied by bond and petition and approval of such bond and order for the issuing of such license upon the payment of the money into the village treasury. No reason is suggested why the minute book of records of the village should not be received as evidence of the facts therein stated, and I know of no such reason.

The thirteenth assignment is that the court erred in permitting the jury to return to their room to change their verdict, after having returned a sealed verdict into court, and having separated.

The 14th, 15th, 16th, and 18th assignments are based upon the court's instructing the jury to bring in a sealed verdict and in sending them out again after having sealed

and deposited it in the hands of their foreman and separated for the night.

This action on the part of the court is set out at length in this opinion. While, so far as I am advised either by the briefs of counsel or otherwise, our statute is entirely silent as to the power or duty of the trial court to direct the bringing in of a sealed verdict or its allowing the jury to separate after being sent out to consider their verdict, until they have agreed upon a verdict and delivered it to the court, yet I believe it to be and to have always been the practice of our courts to give such direction and to allow juries thus to separate, and I fail to see that the court in this instance, so far as the directing the jury to seal their verdict, then to separate and come together again at the hour of the meeting of the court on the next day, and bring in their verdict, has departed from the usual practice.

Thompson & Merriam, in their work on Juries, at section 333, say: "Thus it has been often held in civil cases in conformity with what has already been stated, that the fact that the jury separate after having agreed upon their verdict, but before they have delivered it into court, is no ground for a new trial, although it may subject the jurors themselves to punishment;" citing numerous cases. "It equally follows that the judge may permit this to be done, and that he may, if occasion require it, send the jury out with directions to return a sealed verdict to the clerk, and adjourn the court until the next day, or otherwise. Or he may permit them to disperse for dinner and to bring in a sealed verdict after the noon recess;" citing cases.

I am therefore of the opinion that in the absence of a showing that the conduct of the jury under the direction of the court was unfair, or that something occurred tending to prejudice the interest of the losing party, that so far as this action of the court is concerned, it will be justified. I quote the following from the same work at section 336:

"When a sealed verdict so rendered, on being opened, is found to be informal or defective, the jury cannot be sent out to renew their deliberations upon the main question in controversy, or to make a substantially new verdict; although it is competent for them to retire and amend it in any manner not relating to the main question in controversy;" citing several examples and numerous authorities.

In the work by W. W. Thornton on Juries and Instructions, at section 267, the author says: "The court has the discretion in a civil case to permit the jury to seal up their verdict and separate for the night and deliver it the next morning. If the jury separate, having sealed up their verdict by order of the court and assembled the next morning the verdict is found imperfect, the court may return it to the jury for their reconsideration;" citing three Indiana cases.

The trial court, in taking the action which it did take, doubtless followed the authority of these authors, and so far as I am able to see, followed both their letter and spirit, and as above stated, in the absence of even a suggestion or showing of unfairness or oppression to the losing party, such action will be held free from error.

The direction of the court given to the jury upon sending them out to correct their verdict, to the effect, "That if the defendants Wall and Hall were liable at all they were liable as bondsmen, and that if their principals are liable in an amount equal to or greater than the amount of their bonds (\$5,000), then their bondsmen would be liable in the amount of \$5,000 or not at all," is not technically a charge or instruction of the court to the jury. It was given by the court apparently as an excuse for the direction which he gave in other words, as we have hereinbefore copied. While as an excuse it probably cannot be justified, yet it contained no error of which any party to this action can take advantage.

No further attention need be given to the 20th, 21st, 22d, or 24th assignments.

The 19th assignment of error is made especially in the name and for the benefit of the defendants John Wall and John G. Cory, and seeks a review of the several assignments involving the instructions given and refused, the giving and refusal of which were excepted to in the name of the defendants. It is upon this assignment that that part of the briefs of plaintiffs in error is based, which urges the court to reconsider the several opinions of this court in which it has been held, in effect: "That a motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all, it must be overruled as to all." (*Dutcher v. State*, 16 Neb., 30.) Or as otherwise expressed, "Where in an action against two defendants * * * the evidence is sufficient as to one, but insufficient as to the other defendant, the verdict and judgment being against both, and the one against whom the evidence was insufficient made no motion for a new trial as to himself alone, the judgment will not be disturbed." (*Long & Smith v. Clapp*, 15 Neb., 417.)

I have read with considerable interest the briefs and arguments of counsel, in which they urge that this line of decision should be overruled. It is a question of practice. Were it only the first instance, it is altogether possible that it might be deemed best to establish the practice urged by counsel; but, as counsel seem to admit, the first case in this state in which the point was considered at all was that in which the line of decisions above referred to was started. Upon due consideration, as we then thought of the question, we came to the conclusion that it was more logical, and in a majority of probable cases would be more conducive to justice, to require parties, whose defense rested upon different states of proof, to each one present his motion for a new trial to the court upon its own merits, and thus enable the court with less labor and difficulty to decide each. These and the other obvious considerations connected with the question, induced the court to take the course which it did

take in that respect. This line of decisions began at the January term, 1884, in the case of *Long & Smith v. Clapp*, followed by that of *Dutcher v. State*, in 16 Neb.; *Real v. Hollister*, 17 Id., 661; *Boldt v. Burwig*, 19 Id., 739; *Real v. Hollister*, 20 Id., 112; *Dorsey v. McGee*, 30 Neb., 657.

These cases have, some of them, been before the people and the bar for seven years and have not, to the knowledge of the writer, met with general disapproval. That this line of decisions should be attacked in those cases, where from some reason the practice has not been conformed with, does not present an unusual circumstance. But it must be admitted that consistency and uniformity in the rulings and decisions of courts is next in desirableness to perfection.

A careful review of the Indiana cases satisfies me that while they are not entirely unanimous on the question now under consideration, those of them which we have followed exceed in number those which take the other view, as well as being more recent.

The 22d assignment of error, and the last one to be considered, is as follows: "The court erred in overruling the defendants' challenge for cause to jurymen W. J. Timmerman, to which ruling and decision of the court defendants excepted at the time." I have copied the whole of the bill of exceptions relating to the challenge of these jurors and their examination. It will be observed that while there were two jurors challenged, the overruling of the challenge to but one of them is assigned for error. Attention is also called to the peculiar circumstances that neither of the Christian names of the jurors Timmerman is given, nor is there anything else in the bill of exceptions to enable the court to distinguish the one, the overruling of whose challenge is made the ground of exception. Counsel for defendant in error, in the brief, argue that as neither of the two jurors Timmerman are designated or distinguished from each other by Christian names or otherwise, and both

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were challenged and the challenge overruled as to both, the assignment of error which is assigned to the overruling of the challenge of W. J. Timmerman, the court being unable to distinguish which of the jurors is meant, must, unless it is shown that the challenge was wrongfully overruled as to both of them, sustain the court in overruling the same as to both of them. I think, however, that in the interest of justice, in this case, if it should appear upon the examination of the record that either one of the jurymen Timmerman showed himself upon his cross-examination to be disqualified, by reason of prejudice or otherwise, to serve upon the jury, the assignment should be construed to apply to him and not to the other Timmerman, if he is shown to have been a qualified juror. But I confess to my inability to distinguish between the two as to which, if either of them, is shown by the record to be disqualified.

Attention is also called in the brief to the fact that the record clearly shows that it does not contain all of the examination of one of these jurors upon his *voir dire*. This refers to the first of the Timmermans who was examined, and to the fact that it is only in his examination, in the nature of cross-examination by counsel for defendants, that he states anything about having read an account of the matters involved in the suit in a newspaper, but he does state in answer to a question put by the court that he didn't know anything about the facts except that which he read in "the newspaper." In section 669, page 951 of the Compiled Statutes of 1889 it is provided "that in the trial of any criminal case the fact that a person called as a juror has formed an opinion or impression based upon rumor or upon newspaper statements, about the truth of which he has expressed no opinion, shall not disqualify him to serve as a juror in such case if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law and evidence, and the

court shall be satisfied of the truth of such statement." The above provision of the statute is confined in its terms to criminal cases; but in the absence of any provision providing what degree of knowledge, opinion, or impression, derived from rumor or the reading of newspapers, would disqualify a person to serve on a jury in a civil case, I incline to the opinion that this statute must be held to furnish the correct ruling. This juror, in the first place, declares, in answer to the question of counsel for the plaintiff, "that he has no bias or prejudice against the saloon business or against men engaged in the business in any capacity as would preclude his giving their testimony the same weight and consideration as he would give the same man if he were engaged in other business." Again, "that he has no bias or prejudice against the business or men engaged in it, so that he could not give to their testimony due consideration and weight the same as he would any other men." Again, "that he would pass upon their testimony, considering only whatever interest that they might have in the result of the suit or relationship to the parties the same as he would any other witness." He was then examined by counsel for plaintiffs in error and by the court touching his information, which he doubtless had before communicated, although the same is not contained in the record, that he obtained what information or knowledge he had of the case from an article which he saw in a newspaper. It will be observed that the last question asked of the juror by counsel for the plaintiff in error as to whether "it wouldn't take some evidence to make you believe the other way?" the juror did not answer, or at least his answer is not contained in the record.

The other Timmerman, the Christian name of neither being given in the record, but whom to designate I have styled the second juror Timmerman, first declared upon his examination in answer to the question, "Whether he had any prejudice against men engaged in the business of keep-

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ing saloon?" "That if the law gives a man engaged in that business the privilege, it is an honorable business." It is true that to the next question, "Would you take his word as soon as anybody else's?" he answered "No, sir." This examination of this witness it will be borne in mind was made by counsel for plaintiffs in error. He was not examined as to his meaning, whether the word referred to included his word on oath or not, but his examination by counsel for plaintiff in error was extended only far enough to enable him to say in answer to the proper question, "That he was a member of an organization which had for its object the suppression of the sale of intoxicating liquors." In answer to questions by the court, however, this juror did say, "That the organization to which he referred was political in its nature and not a secret society; that his connection with that organization and his interest in it wouldn't be such as would prejudice him against the men engaged in the traffic of intoxicating liquors to that extent that he wouldn't give his testimony the same weight as other men. Also, that he would be able to listen to the testimony upon oath of a man engaged in the liquor traffic and interested in the result of the suit and give it the same weight as he would the same man if he was engaged in other business and interested to the same extent, and that he wouldn't allow the fact of his being engaged in the liquor traffic to influence him." Looking at the answers of this juror, and giving them the meaning which the juror evidently intended they should have, I cannot construe them as showing prejudice or partiality in the mind of the juror, which made it error on the part of the court to overrule his challenge. I will state for whatever it may be worth that there is no evidence in the record of a peremptory challenge of any juror by the defendants, or either of them.

The fact that the deceased obtained the intoxicating liquor upon which he became intoxicated, and which intoxi-

cation led to his death, in part from the saloon known as the "East" saloon, which, according to all the evidence, was kept by Scott & Gorman, depends upon the evidence of the witness George Stone, although he is to some extent corroborated by other witnesses, not in the fact of the purchasing of intoxicating liquors by the deceased or the witness, or the drinking of the same in the said saloon, but in the fact that they came out of the saloon just previous to going into the Reed saloon and there drinking. The fact of their drinking at all in the saloon of Scott & Gorman is squarely denied by the witness Jamieson in his testimony. The jury thus had the testimony of the witness Stone, slightly corroborated as it was, and its contradiction by the witness Jamieson before them.

So far as this court is concerned, then, the jury having found for the plaintiff, it must stand as settled in this case that the liquors upon which the deceased became intoxicated, and which intoxication led to his death, were in part obtained from the saloon of Scott & Gorman and from the barkeeper in their employment. As I view the law after such examination as I have been able to give to this case, this fact, when applied to the pleadings, the evidence and the attitude of the parties, fixes the conclusion to which we must come, and fixes the liability of each of the several parties defendant. The defendants Scott & Gorman being liable and having been sued jointly with the other defendants, and there being but one motion for a new trial and all of them having joined in the petition in error, if the evidence is sufficient to sustain the verdict as to Scott & Gorman, it must be sustained as to all the rest. There is but one motion for a new trial in the record and that was made on behalf of all of the defendants except Edgar L. Hall. Whether his name was left out purposely or through mistake is nowhere stated. There is in the case neither argument nor evidence especially applicable to the fifth assignment that the damages are excessive. In the absence

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of any suggestion or argument pointing out wherein they are excessive, that assignment must be overruled. The judgment of the district court is

AFFIRMED.

THE other judges concur.

38	96
41	821
33	98
49	664
33	98
50	793

MERCY RENFREW, EXECUTRIX, v. WILLIAM M. WILLIS.

[FILED SEPTEMBER 29, 1891.]

1. **Petition: FAILURE TO STATE CAUSE OF ACTION: VOLUNTARY PAYMENT.** A petition of the plaintiff alleging overpayments to the defendant, under a contract of lease and rental, which from the evidence were voluntary payments, *held*, not to state facts sufficient to constitute a cause of action.
2. ———: ———: **ANSWER NOT A WAIVER.** If the facts stated do not constitute a cause of action, filing an answer by defendant is not a waiver of the defects. (7 Neb., 240; 13 Id., 255.)
3. ———: ———: **A DEFECT** in a petition which would be fatal to recovery may be taken advantage of at any time. (17 Neb. 572.)
4. **Voluntary payments cannot be recovered back.** (9 Neb., 152.)
5. **Money paid by mistake may, in some cases, be recovered back in an action at law, but in such cases the mistake must be pleaded and proved.** (15 Neb., 50.)

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Batty, Casto & Dungan, for plaintiff in error.

C. H. Tanner, *contra*.

COBB, CH. J.

The plaintiff below, on December 6, 1888, alleged that on the 18th day of February, 1886, in the county of

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Adams, this defendant and plaintiff entered into a written agreement and contract, the following of which is a true and correct copy :

"This writing witnesseth, that Sylvester Renfrew and William M. Willis, of the county of Adams, state of Nebraska, hereby covenant and agree that if the said Willis shall well and truly make the payments as hereinafter written and set forth to be made by him—each and all—when the same shall become due and payable, and faithfully perform all his part as set forth in this writing, he shall be privileged to occupy and use all that part of sections 25-10-9 and 25-10-10 lying north of the south channel of the Platte river in Hall county, Nebraska, for the term of five years, from and after the first day of March, 1886, and no longer. In consideration of which privilege and use, and as rental therefor, the said Willis hereby agrees to pay to the said Renfrew eight hundred dollars per annum, to be paid on or before the last day of December of each year, to-wit: Eight hundred dollars on the 31st day of December, 1886, and eight hundred dollars on the 31st day of December of each year thereafter, until and including the year 1890. And as early as the first day of March of each year, to execute and deliver to the said Renfrew full and ample security for the payment of the rental of that current year, by mortgage or otherwise, that shall be satisfactory to the said Renfrew.

"Said Willis shall, as a further consideration for the use of said premises, deliver to the said Renfrew ten tons of good hay in stack, on the place, from each year's cutting, to be removed at the pleasure of the said Renfrew. It is further agreed that the said Willis shall mow the grass on the land lying south of the pasture fence, and west of the railroad, each year for hay, wherever the willows do not render the mowing of the same impracticable, and properly stack and care for the hay thereon, and any willow patches not practicable for mowing may be plowed and cultivated

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to exterminate the willows, then seed to tame grass, and such willow patches not mown or plowed by said Willis during the two first years, may be plowed and used by said Renfrew during the balance of this agreement, without otherwise effecting or changing the terms or payments of rental. Said Willis shall not make any changes in the buildings or fences now on the place other than necessary repairs; nor shall he make any repairs or improvements on said premises at the expense of said Renfrew without his written consent thereto.

"It is especially agreed by the parties hereto, that in case the said Willis shall fail to make any or either of the payments as above written when the same shall become due and payable, or to give the securities therefor, at the time and in the manner set forth, to the satisfaction of the said Renfrew, then, and in that case, the said Renfrew may at his option declare this agreement forfeited by the said Willis, and re-enter and take full possession of said premises with or without due process of law. And from and after the time of such failure on the part of said Willis, his right to occupy and use the premises, or any part thereof, shall cease. *Provided*, That the right to so declare forfeiture and re-enter and take possession shall in nowise bar the said Renfrew from recovering any unpaid rental that may have accrued at the time of regaining such possession, or any damage he may have sustained by reason of such failure on the part of the said Willis. Said Willis shall so watch and care for the premises and the buildings, fences, wells, windmills, and tanks, etc., thereon as to prevent unnecessary waste or decay. He shall not lease or let the premises or any part thereof, to any person or persons whomsoever without the written consent of the said Renfrew. He shall at the expiration of five years, as above written, vacate the premises to the said Renfrew in good condition and without notice.

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"Witness our hands this 18th day of February, 1886.

"SYLVESTER RENFREW.

"W. M. WILLIS.

"Attest:

"CLARA B. PARR."

Second—That under and by virtue of said agreement, the plaintiff entered upon and took possession of the premises described in the same, on the first day of March, 1886, and remained in possession of said premises for the period of two years from said first day of March, 1886.

Third—That during the said time the plaintiff paid and delivered to the said defendant the following sums of money and property, to-wit: During the year 1886, from the first day of March thereof, up to and including the fourth day of July, 1887, hay and cash to the amount of \$800, the same being rent for said premises under the contract aforesaid.

October 8, 1887, cash.....	\$300 00
March 8, 1888, cash.....	71 05
March 10, 1888, cash.....	175 00
March 10, 1888, note of Stewart and Benedict for \$261, discounted nine per cent, balance ...	237 51
March 14, 1888, cash.....	1,519 66
March 20, 1888, draft on Doniphan Bank.....	145 00
March 21, 1888, cash.....	50 00
April 7, 1888, cash.....	50 00
April 7, 1888, work and labor in 1887-8	24 00
Total.....	\$3,372 22

Fourth—Plaintiff further alleges that the money was paid to the defendant, and the labor was done and performed by the plaintiff for the defendant at defendant's special instance and request, by virtue of the contract and agreement aforesaid.

Fifth—That of the money paid by the plaintiff to the defendant, the defendant is entitled to a credit of \$1,600

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and no more, for the rent of the premises for the period of two years beginning on March 1, 1886, and ending on March 1, 1888.

Sixth—That the balance of said money, to-wit, \$1,772.22 is wholly due and unpaid from the defendant to the plaintiff.

The defendant answered that she admits the making of the lease mentioned in said petition.

Further answering, says that the plaintiff only occupied said premises two years and on account of the rent there was due the defendant sixteen hundred dollars in money and twenty tons of hay; that said twenty tons of hay was reasonably worth the sum of one hundred and ten dollars.

The defendant therefore says that there was due her on account of rent of said premises described in said lease the sum of seventeen hundred and ten dollars.

The defendant further says that the said plaintiff, for a valuable consideration, executed and delivered to the said Sylvester Renfrew, during his lifetime, the following promissory notes, to-wit:

“\$200. HASTINGS, NEBR., April 9, 1887.

“One year after date, for value received, I promise to pay to Sylvester Renfrew, or order, two hundred dollars, with interest thereon at the rate of ten per cent per annum from date until paid.

WM. M. WILLIS.

“\$650. HASTINGS, NEBR., February 26, 1886.

“On or before the 26th day of February, 1888, for value received, I promise to pay to the order of Sylvester Renfrew six hundred and fifty dollars, with interest at the rate of ten per cent per annum payable annually from date until paid.

W. M. WILLIS.

“\$350. HASTINGS, NEBR., February 26, 1886.

“On or before the 26th day of February, 1887, for value received, I promise to pay to the order of Sylvester Renfrew three hundred and fifty dollars, with interest at

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the rate of ten per cent per annum, payable annually, from date until paid.

W. M. WILLIS."

There is now due the defendant from the plaintiff rent for 1886 and 1887, as follows:

The sum of \$1,710, with interest at seven per cent per annum from the first day of January, 1888; total..... \$1,879 20

There is due on the \$650 note as follows:

Principal..... \$650 00

Interest at ten per cent from Febru-

ary 26, '86, to May 20, '89, the

sum of 210 34

Total..... 860 34

There is due on the \$350 note as follows:

Principal..... \$350 00

Interest from February 26, 1886, to

May 20, 1889, at ten per cent.... 110 82

Total 460 82

There is due on the \$200 note as follows:

Principal..... \$200 00

Interest from April 9, 1887, to May

20, 1889, at ten per cent per an-

num 42 21

Total..... 242 21

Making due from the plaintiff to the defendant, from all sources, the total sum of..... \$3,442 57

There has been paid on said indebtedness from time to time the sum of..... 2,645 61

Leaving a balance due to the defendant from the plaintiff in the sum of..... \$796 69

For which amount, with costs of suit, this defendant asks judgment.

The plaintiff replied, first, that according to the terms of the lease as set forth in plaintiff's petition, the rent to

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be paid by the plaintiff to the defendant for the premises therein described, was \$800 in cash and ten tons of hay, cut and delivered to the defendant in the stack; but that on account of loss of hay during the first year the said premises were occupied by the plaintiff under said lease, and by reason of other losses sustained by the plaintiff in the management of said premises, the said lease was changed like this, to-wit, the defendant releasing said Willis from his obligation under said lease to cut and deliver to the said defendant the ten tons of hay as provided in said lease.

Second—Plaintiff further replying says, that at the end of the first year said written lease was abandoned and by mutual agreement between the plaintiff and the defendant held for naught, and that a new oral lease for the same premises was entered into, whereby the plaintiff was to pay for the use of said premises the sum of \$800 and no more; that said sum of \$800 has been fully paid for the year expiring March 1, 1888.

Third—Plaintiff further replying says that the \$200 note mentioned in the defendant's answer was given by the plaintiff to the defendant for money borrowed by the plaintiff of and from the defendant; that said note was secured by a chattel mortgage upon a large amount of personal property, to-wit, live stock belonging to said plaintiff; that on the 8th day of March, 1888, said live stock was sold at public sale, the proceeds of the sale thereof, negotiable promissory notes, whereby the plaintiff turned over and delivered to the said defendant in full liquidation of the said note of \$200, whereby the same was and has been fully paid and satisfied.

Fourth—Plaintiff further replying says, that the two notes, one for \$650 and the other \$350 as described and set fourth in defendant's answer, were made and delivered by the plaintiff to the defendant, and were secured by real estate mortgage upon certain real estate situated in the city

of Hastings, Adams county, Nebraska; that on the 16th day of August, 1889, said defendant instituted in the district court of Adams county, Nebraska, a proceeding for the purpose of foreclosing said mortgage, whereby to satisfy the said notes; that said case of foreclosure on said notes is still pending and undetermined in this court; that the property secured by said mortgage is amply sufficient in full to more than satisfy the principal and interest on said notes, together with the costs of the foreclosure.

The plaintiff denies each and every other allegation in the defendant's answer contained.

On May 25, 1889, there was a trial to a jury, with a verdict for the plaintiff for \$838.17. The defendant's motion for a new trial being overruled, judgment was entered on the verdict.

The plaintiff in error assigns the following for review:

1. Error in allowing any evidence to the jury for the reason that the petition fails to state a cause of action.
2. In excluding defendant's exhibit 4.
3. The verdict is contrary to law and not supported by any evidence.

The record discloses the history of this action in a clouded multiplicity of accounts between two neighbors, landlord and tenant, running through four years, under the contract set forth. The balance claimed by the defendant on the trial was \$796.69, and the verdict for the plaintiff was \$838.17, though the amount claimed was \$1,772.22. However scrupulously or carelessly the accounts of their transactions were cast up and rendered by these parties to each other, will not be the subject of review. Those questions of fact may be again considered by a jury, and the questions of law only are to be considered here. The first objection is believed to be well taken, that the petition fails to state a sufficient cause of action.

It appears at the opening of the trial the defense objected to the introduction of evidence for that reason. The

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answer of the defendant did not waive that defect. Nor are the defects in the substance of the petition cured by the answer. If the petition failed to state a sufficient cause of action, it will not support the present judgment. We find that the former decisions of the court support these propositions: *Farrar v. Triplett*, 7 Neb., 240; *Haggard v. Wallen*, 6 Id., 272; *O'Donohue v. Hendrix*, 13 Id., 255; *Thompson v. Stetson*, 15 Id., 112.

The petition, then, must stand on its allegations, unaided by any other pleading or proceeding in the case, and to it alone our attention is directed. The right of the defendant, after judgment, to object to the petition on this ground will not be questioned. The objection on the trial was urged that if the payments were in fact made, as set out in the petition, from October 8, 1887, to April 7, 1888, they were voluntary payments, without any allegation that any part of the \$3,348.22 was made by mistake of the plaintiff, or superinduced by any fraud practiced by the defendant. If the payments were voluntary, and if it does not appear upon what account, claim, or pretext \$1,772.22 of the total sum was paid over to the plaintiff in error's testator in his lifetime, it is then clear that the petition in this case will not support the judgment, on the ground that voluntary payments cannot be recovered back in an action at law. (*Herman v. Edson*, 9 Neb., 152; *Foster v. The County of Pierce*, 15 Id., 48.)

The allegation of the petition that these payments were made at the special instance and request of the defendant, by virtue of the contract set forth, when no part of the sum of the verdict was claimed to be due on the contract, is neither a device nor an evasion, but in this case is simply a negation, with the strong presumption that, if paid at all, the money was voluntarily paid. In the absence of allegation or proof to maintain the obligation of such payments, the first assignment of error is sustained.

The second assignment is for error in excluding a mem-

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orandum of settlement between the parties, in the lifetime of the defendant's testator, and in his handwriting. While such memorandum might have been useful and proper to refresh the memory of the witness who testified to its purport, we think it was properly excluded as a settlement between the parties, with such instruction to the jury, and is overruled.

From what has been said, the third assignment, that the verdict is contrary to law, and is not supported by the evidence, must be sustained, and the judgment reversed. The cause is remanded to the district court for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

OLIVE B. CRAWL V. J. S. HARRINGTON.

[FILED SEPTEMBER 29, 1891.]

33	107
456	394

School Land: CONTRACT FOR SALE: NO DOWER IN. Certain school lands were sold by the state in 1875, and one-tenth of the purchase price paid, the purchaser receiving a contract of sale. In 1879 an assignee of the purchaser conveyed said land to one K. by quitclaim deed. In the same year K. conveyed the land by a quitclaim deed to one H. Held, That the wife of K. had no dower interest in such land.

ERROR to the district court for Buffalo county. Tried below before HAMER, J.

Thompson & Oldham, for plaintiff in error, cited: *Duke v. Brandt*, 51 Mo., 221-226; *Moore v. Kent*, 37 Ia., 20.

Calkins & Pratt, contra, cited: *Reed v. Whitney*, 7 Gray [Mass.], 533; *Lobdell v. Hayes*, 4 Allen [Mass.], 186;

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Hopkinson v. Dumas, 42 N. H., 296; *Hamlin v. Hamlin*, 19 Me., 144; *Beebe v. Lyle*, 73 Mich., 114; *Whitaker v. Vanschoiack*, 5 Ore., 113; *Farnum v. Loomis*, 2 Id., 29; *Cornog v. Cornog*, 3 Del. Ch., 414; *Bush v. Bush*, 5 Id., 144; *Latham v. McLain*, 64 Ga., 320; *Woodhull v. Reid*, 1 Har. [N. J.], 128; *Hamilton v. Hughes*, 6 J. J. Mar. [Ky.], 581; *Heed v. Ford*, 16 B. Mon. [Ky.], 114; *Gulley v. Ray*, 18 Id., 107; *Worsham v. Callison*, 49 Mo., 206; *Morse v. Thorsell*, 78 Ill., 600; *Steele v. Magie*, 48 Id., 396; *Greenbaum v. Austrian*, 70 Id., 591; *Glenn v. Clark*, 53 Md., 580.

MAXWELL, J.

This is an action to recover damages for an alleged breach of the covenant of warranty. A demurrer was sustained to the petition and the plaintiff not being able to amend, the action was dismissed.

The petition is as follows :

" Now comes the plaintiff and for cause of action against defendant alleges :

" I. That the state of Nebraska being by virtue of an act of congress the owner of lot No. 16, S. E. $\frac{1}{4}$ school section addition to Kearney Junction, now city of Kearney, Buffalo county, Neb., on the 3d day of June, 1874, at public sale, in accordance with the laws of said state, sold said lot of land to the Kearney Manufacturing & Land Co., a joint stock company doing business under the laws of the state of Nebraska, the consideration of such sale being \$190, payable one-tenth in cash and the balance in yearly installments of \$19 each; that the treasurer of Buffalo county received from said company said cash installments of \$19 and gave his receipt therefor, which said receipt was duly recorded on deed record of said county at Book H, page 378.

" II. That afterwards, to-wit, on the 27th day of October, 1879, the said Kearney Manufacturing & Land Com-

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pany duly conveyed their interest in and to said premises, acquired as aforesaid by quitclaim deed properly executed and acknowledged by the trustees of said company, to Nathan Campbell and Elisha C. Calkins, assignees, which said deed was duly recorded in the records aforesaid at Book H, page 327 thereof.

"III. That afterwards, to-wit, on the 27th day of October, 1879, the said Nathan Campbell and Elisha C. Calkins, assignees as aforesaid, for a valuable consideration sold said real estate to one Francis G. Keens and conveyed the same to said Keens by a quitclaim deed which was duly recorded in said records at Book H, page 329.

"IV. That afterwards, viz., on the 17th day of November, A. D. 1879, the said Francis G. Keens, by his quitclaim deed duly acknowledged, conveyed his interest in said real estate to Minnie B. Harron, which said deed was duly recorded in Book H, page 379, of the records of said Buffalo county.

"V. That on the 27th day of November, 1883, the said Minnie B. Harron, for a valuable consideration, conveyed her interest in said land by quitclaim deed duly acknowledged, to one Louisa S. Clark, which said deed was duly recorded in said records at Book O, page 100.

"VI. That on the 20th day of September, 1884, the said Louisa S. Clark, for value, conveyed her interest in said premises by quitclaim deed duly executed and acknowledged, to one Warren Caswell, which said deed was duly recorded in said records at Book Q, page 70.

"VII. That on the 1st day of June, 1887, the said Warren Caswell having made the final payment of the installments, due to the state of Nebraska, demanded a deed from the state of Nebraska, and the state of Nebraska, by the governor thereof and according to law, conveyed by deed said premises to said Warren Caswell, which said deed was duly recorded in said records at Book R, page 131.

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"VIII. That on the 6th day of May, 1887, the said Warren Caswell, being then the owner in fee of said land, conveyed the same for a valuable consideration, properly executed and acknowledged, by warranty deed to one John S. Harrington, which said deed was duly recorded in the records aforesaid at Book 28, page 381 thereof.

"IX. That on the 9th day of May, 1887, the said J. S. Harrington laid out and platted said lot 16, S. E. $\frac{1}{4}$ school section addition to Kearney, Neb., into lots and named the same Elmer Place Addition, a subdivision of lot 16, S. E. $\frac{1}{4}$ school section addition to Kearney, Neb., which said plat was duly acknowledged, filed, and recorded at Book Z, page 290 of deed records of said Buffalo county.

"X. That on the 22d day of March, A. D. 1888, the said defendant John S. Harrington, in consideration of the sum of \$2,800, delivered to plaintiff a warranty deed of that date duly executed, and thereby sold and conveyed to plaintiff the following described lands, viz.: lots numbered 12, 13, 14, 15, and 16, in Elmer Place, a subdivision of lot 16 in the S. E. $\frac{1}{4}$ of school section addition to Kearney, Neb., and by said deed defendant covenanted as follows: And we do hereby covenant with the said Olive B. Crawl, and her heirs and assigns, that we are lawfully seized of said premises, that they are free from incumbrance except balance due on loan to Kearney Building and Loan Association, that we have good right and lawful authority to sell the same, and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever except the Kearney Building and Loan Association. * * *

"XI. The plaintiff alleges that said premises were not free from incumbrance at the time of the execution and delivery of the said deed, but in truth and in fact on the 27th day of October, 1879, at the time the said Francis G. Keens purchased said lot 16, S. E. $\frac{1}{4}$ school section addi-

tion to Kearney, Nebraska, he was a married man and his wife, Ella J. Keens, was then and is still living, and is entitled to a dower interest in said lands, and neither at the time said Francis G. Keens, her husband, sold his interest in said lands to the said Minnie B. Harron, nor at any other time, has she released her right of dower, and she still has and claims a dower interest in said lands and the lots conveyed as aforesaid by defendant to this plaintiff of the value of \$250, which is a valid and subsisting incumbrance against said lands of plaintiff contrary to and in violation of the covenants, agreements, and understandings of the defendant to this plaintiff, all of which the defendant knew and still knows, and he neglects and refuses to relieve said lands of said incumbrance, to the damage of this plaintiff in the sum of \$250.

"The plaintiff therefore prays judgment against the defendant for the sum of \$250, and interest thereon from the 22d day of March, 1888, and costs of suit."

There is also a petition of intervention by Mrs. Keens which need not be noticed.

The first question presented is: Does the alleged interest of Mrs. Keens in the premises constitute an incumbrance thereon?

The statute in relation to dower, as it existed in 1879, was as follows:

"Section 1. The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seized of all estate of inheritance at any time during the marriage, unless she is lawfully barred thereof.

"Sec 2. If a husband, seized of an estate of inheritance in lands, exchange them for other lands, his widow shall not have a dower of both, but shall have her election to be endowed of the lands given or of those taken in exchange, and if such election be not evinced by the commencement of proceedings to recover her dower of the lands given in

exchange, within one year of the death of her husband, she shall be deemed to have elected to have taken her dower of the lands received in exchange."

An estate of inheritance is an estate which may descend to heirs. (1 Washb., R. P., 51.) All freehold estates are of inheritance except estates for life. (1 Bouv., Law Dict. [14th Ed.], 539.) In its broad sense the word "estate" includes both real and personal property, but in its more limited sense it applies to land alone; and the term is used to denote the quality, quantity, and extent of the interest which the owner possesses in the land. Therefore estates are divided into such as are freehold and those less than a freehold. Blackstone, vol. 2, 103, says: "An estate of freehold, *liberum tenementum*, or frank-tenement, is defined by Britton to be the '*possession* of the soil by a freeman.' And St. Germyn tells us that 'the possession of the land is called in the law of England the frank-tenement or freehold.' Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, *freehold*; which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feudal investiture. And from these principles we may extract this description of a freehold: that it is such an estate in lands as is conveyed by livery of seisin, or in tenements of any incorporeal nature by what is equivalent thereto. And accordingly it is laid down by Littleton that where a freehold shall pass, it behoveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates. Estates of freehold (thus understood), are either estates of *inheritance* or estates *not of inheritance*. The former are again divided into inheritances *absolute* or fee simple, and inheritances *limited*, one species of which we usually call fee-tail."

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An estate less than a freehold is not an estate of inheritance at common law, and that law prevails on this point in this state. The Kearney Building & Loan Association had purchased the land in question and paid one-tenth of the purchase price thereon when Keens purchased the same. The company could only convey an equitable title to the property, and the fact that a deed was made by one who possessed only an equitable title would carry no greater interest than he possessed. The legal title still remained in the state. It was not, therefore, an estate of inheritance, and the wife took no dower therein. This disposes of the case without considering the other questions presented.

The judgment of the district court is

AFFIRMED.

THE other judges concur.

NORFOLK NATL. BANK V. WOOD, BANCROFT & CO.

[FILED SEPTEMBER 29, 1891.]

1. **Evidence: ADMISSIONS OF WIFE.** Where the proof fails to show that the wife of the person in possession of a farm had authority to control the business in the absence of her husband, the admissions of such wife in regard to the business of the farm cannot be received, and an instruction submitting them to the jury is erroneous.
2. **Chattel Mortgages: DESCRIPTION OF PROPERTY.** Where cattle were described in a chattel mortgage as "forty head of steers, three years old next spring, being all steers of that age owned by us; sixty head of steers, two years old next spring, being all of that age we own except forty head; all of the above are branded with figure 4 on left hip and are kept on the Verges farm," etc., the descriptions are to be considered in conjunction by the jury, and not in the disjunctive, and an instruction which submits each part of the description as though it was the whole is erroneous.

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3. **Instructions: PARAGRAPHS.** Under the Code, each paragraph of the instructions should contain but a single proposition of law.

ERROR to the district court for Stanton county. Tried below before NORRIS, J.

Holmes & Hayes, for plaintiff in error, cited, as to the description: *Price v. Comas*, 21 Neb., 198; *Wiley v. Shars Id.*, 716.

Allen, Robinson & Reed, contra, cited, as to the wife's agency: *Moffitt v. Cressler*, 8 Ia., 122; *Wood Mach. Co. v. Crow*, 30 N. W. Rep. [Ia.], 609; *Furman v. R. Co.*, 17 Id., 599; *McLaren v. Hall*, 26 Ia., 297; *Miller v. Hollingsworth*, 33 Id., 224; 9 Am. & Eng. Ency. of Law, 839, sec. 3.

MAXWELL, J.

This is an action for conversion of one hundred head of cattle.

The answer is a general denial.

On the trial of the cause the jury returned a verdict for the defendant upon which judgment was rendered.

The plaintiffs claim a special interest in the cattle by virtue of a chattel mortgage as follows:

"The undersigned, of sec. 7, town 25, range 1 west, county of Pierce, state of Nebraska, for the purpose of securing the payment of \$1,900 and interest according to the condition of one promissory note of even date herewith as follows: one note payable March 24, 1888, for \$1,900 and signed by John Welch and Michael Welch, do hereby sell and mortgage unto the Norfolk National Bank, and its assigns, the following described property now in my possession in said county and state, and free from all incumbrance, to-wit: forty head of steers, three years old next spring, being all steers of that age owned by us; sixty head

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of steers, two years old next spring, being all of that age we own except forty head. All of the above are branded with figure 4 on left hip and are kept on the Verges farm, Sec. 7, Tp. 25, R. — W., Pierce county, Nebraska, now in our possession as tenant; *Provided*, That if the undersigned shall pay the said debt then this mortgage shall be void, and it is hereby agreed that if default be made in the payment of said debt or any part thereof, or if any attempt be made to remove or dispose of said property; or if at any time the said John and Michael Welch shall neglect or refuse to care for said chattels in a husbandlike manner, or whenever the said Norfolk National Bank may choose, he is hereby authorized to enter upon the said premises where the said property may be, and remove or sell the same at public or private sale without notice, and out of the proceeds retain the amount then owing on the said debt with expenses attending the same, and attorney's fees, rendering to the undersigned the surplus after the whole of said debt shall have been paid, with charges aforesaid; if from any cause said property shall fail to satisfy said debt, interest, costs, and charges, I covenant to pay the deficiency.

"Signed this 22d day of September, 1887.

"JOHN WELCH. [SEAL.]

"MICHAEL WELCH. [SEAL.]

"In presence of

"N. A. RAINBOLDT."

The court gave the following instructions:

"I. Plaintiff alleges that on the date specified in his petition he had a special ownership in certain steers described in the petition, by virtue of a chattel mortgage executed in favor of plaintiff by John Welch and Michael Welch to secure the payment of \$1,900 due on the 24th day of March, 1888, and that defendant on same day, between the day of the making of said note and the day the same became due, obtained possession of said steers and converted

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the same to his own use, to the plaintiff's damage in the sum of \$1,500.

"II. Defendant denies every averment of plaintiff's petition, excepting the corporate capacity of plaintiff, which is admitted.

"III. In this case the burden of proof is upon plaintiff to prove all the material allegations of his petition. Plaintiff claims a special ownership in the property in controversy by virtue of a chattel mortgage. The holder of a chattel mortgage holds the legal title to the property described therein and may follow and take possession of the same wherever it can be found and identified. In this case it devolves upon plaintiff to prove, by a fair preponderance of the evidence, that the cattle claimed by him in this action were the same, or are part of the same, described in the mortgage executed by John and Michael Welch in favor of plaintiff, before he can recover.

"IV. You are instructed that the validity of the chattel mortgage in controversy is a question of law to be decided by the court, and that the court has decided the same to be valid; the only question for you to decide is whether or not the cattle claimed by plaintiff are described in said chattel mortgage.

"V. The jury are instructed as a principle of law that the representations of defendant or its agent, or one in whose charge or custody its cattle may have been left, are admissible in evidence regarding the condition or disposition of the cattle, but the representations or statements of any other party than the defendant, its agent, or a custodian, as above described, are inadmissible in evidence. If the jury believe from the evidence that Mrs. Mortimer, at the time witnesses Wheeler and Whitham visited the defendant's cattle yards to inspect the cattle therein, was in charge of defendant's premises and acting for defendant, and by defendant's authority, then her statement regarding the cattle as in evidence should be considered by you as

other evidence in making up your verdict; but if you believe from the evidence that she was not in charge of defendant's premises, as above stated, you will disregard all evidence as to any statements made by her and dismiss them from your minds in deciding upon your verdict."

It is conceded that there is no evidence to sustain the last instruction, but the defendant in error claims that the giving of the same was error without prejudice. There is no evidence that Mrs. Mortimer was her husband's agent, or had charge of business matters on the farm, or had any authority to make declarations to the defendants. The instruction on this point therefore was clearly erroneous.

The court, at the defendant's request, gave the following instruction:

"If the cattle purchased by the defendants of John and Michael Welch, or any of them, were not branded on the left hip with the figure '4,' as alleged, or if they were not owned and kept by said John and Michael Welch on the Verges farm in Pierce county, Nebraska, on or about the 22d day of September, 1887, or if they were so branded, owned, and kept, but were at the time the mortgage was given and at the time the defendants purchased them an indistinguishable part and parcel of a common mass or herd of two hundred head or more of cattle of like brand, age, and sex, owned and kept by the said John and Michael Welch, and were never set apart, identified, and distinguished from the common mass or herd as the cattle included in the plaintiff's mortgage, and a stranger, aided by the suggestions of the mortgage, and reasonable inquiry, could not have selected them from the common mass or herd as the cattle included in the mortgage, and the defendants bought them in good faith for value and without any actual notice of the plaintiff's claim, then, and in either event, your verdict must be for the defendants."

It will be observed that a number of propositions are joined in this instruction. First, that if any of the cattle

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were not branded on the left hip with a figure 4, or second, if they were not owned and kept by John and Michael Welch on the Verges farm, etc., on or about the 22d day of September, 1887. It will be observed also that the brand is not made a particular part of the description, but follows the other description. "Forty head of steers, three years old next spring, being all steers of that age owned by us. Sixty head of steers, two years old next spring, being all of that age we own except forty head." The brand, therefore, is but a part of the description, and the court in submitting a part of the description to the jury and instructing them, in effect, that if they found the part wanting they should thereupon find that the whole did not exist, is erroneous.

Third—Or "if they were so branded, owned and kept, but were at the time the defendant purchased them an indistinguishable part and parcel of a common mass or herd of two hundred head or more of cattle of like brand, age, and sex, owned and kept by the said John and Michael Welch, but were never set apart, identified, and distinguished from the common mass or herd," etc., the jury were to find for the defendant. Suppose the description related to land, would it not all be considered, and the maxim "*Id certum est quod certum reddi potest*" be applied? The same rule will be applied in this case.

The effect of the instruction seems to have been to confuse the jury by mixing up a number of propositions in the alternative which are inconsistent with each other.

The Code requires each paragraph to contain but a single proposition of law, and a strict adherence to the rule tends to simplify the procedure, and promote the ends of justice.

There are other errors assigned which need not be noticed.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

O. W. BUTTS, APPELLANT, v. G. W. HUNTER ET AL.,
APPELLEES.

[FILED SEPTEMBER 29, 1891.]

Fraudulent Conveyances. In an action by a judgment creditor to subject certain real estate conveyed to third parties to the payment of a judgment, *held*, that the proof failed to show a *bona fide* sale and conveyance and that the property was liable to the judgment.

APPEAL from the district court for Hall county. Heard below before HARRISON, J.

Thompson Bros., for appellant.

O. A. Abbott, *contra*.

MAXWELL, J.

This is an action in the nature of a creditor's bill to subject the undivided one-third interest in lot 8, block 19, in Wasmer's addition to Grand Island, and the undivided one-third of lot 1, block 21, in the original town of Grand Island, to the payment of the plaintiff's judgment.

George W. Hunter and wife made no defense.

David C. Zink and Julius A. Hunter answered: "Said defendants David C. Zink and Julius A. Hunter further answering, allege that these defendants were, on or about the month of June, A. D. 1888, and for a long time prior thereto, with said George W. Hunter, each the owners in severalty of portions of the real estate mentioned and described in the plaintiff's petition, that is to say, each of said defendants, David C. Zink, Julius A. Hunter, and George W. Hunter, were the owners of an undivided one-third part of each of the lots and tracts of land in said plaintiff's petition mentioned and described; that on or about the

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month of June, A. D. 1888, they purchased of said George W. Hunter his undivided one-third part in each of said lots and tracts of land, and paid said George W. Hunter therefor the fair price and full market value thereof, to-wit: "The $\frac{1}{3}$ of lot 8, block 19, Wasmer's addition\$133 00
"The $\frac{1}{3}$ of lot 1, block 21, original town..... 300 00

"Deny that said premises were purchased without consideration; deny that said purchase was made for the purpose of hindering and defrauding the plaintiff, or any other creditor of said George W. Hunter, or any other persons, but allege that the interest of said George W. Hunter was purchased by these defendants for value in good faith and without notice, knowledge or belief that said George W. Hunter intended thereby to defraud the plaintiffs or any other of his creditors, wherefore these defendants pray the judgment of this court that they go hence without date and recover their costs about this suit in their behalf expended."

In the reply the plaintiff denies that the defendants paid any consideration for the lots.

On the trial of the cause the court found the issues in favor of the defendant and dismissed the action.

Julius A. Hunter was called as a witness by the plaintiff and testifies that George W. Hunter, D. C. Zink, and himself were partners in the grocery business prior to June 20, 1888; that about the 16th day of June of that year George W. and wife made a deed to Zink and himself for their interest in said lots, and that he had no knowledge for some time thereafter of the existence of said deed. His testimony is frank and bears upon its face the stamp of truth. Mr. Zink testifies that he managed the business of Julius; that he did not tell him at the time of the purchase that he had received a deed of conveyance from George and wife.

He also states the consideration was paid by checks on The First National, and Bank of Commerce of Grand

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Island. It is proved beyond controversy that no such checks were presented to either or both of said banks or paid. An attempt was afterwards made to change the proof in that regard by introducing the ledger of the firm of Zink & Hunter to show a payment on June 16, 1888, to George of the sum of \$1,006.98.

The book of original entries is not before us and the ledger is not evidence under the statute. Besides, Mr. Zink is clearly shown to have been mistaken in his statements as to payments through the bank, and we are convinced that he is mistaken in regard to the ledger. There is failure of proof to sustain the consideration for the deeds in question.

It follows that the judgment must be reversed and the cause remanded to the district court, with directions to subject the property in question to the payment of the judgment.

JUDGMENT ACCORDINGLY.

THE other judges concur.

COUNTY OF LANCASTER, APPELLEE, V. E. P. TRIMBLE
ET AL., APPELLANTS.

[FILED SEPTEMBER 29, 1891.]

1. **Statutes:** UNIFORMITY OF OPERATION. Where a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, it is not objectionable as wanting uniformity of operation. (*State v. Berka*, 20 Neb., 375.)
2. **Taxation:** LEGISLATURE CANNOT RELEASE PROPERTY FROM. The legislature has no power to release property from the payment of its proportionate share of taxes, nor can it confer such authority upon county commissioners.

33	191
34	758
35	122
36	404
33	121
37	309
33	121
44	565
33	121
53	758
33	121
59	3
59	428
33	121
61	138

County of Lancaster v. Trimble.

3. ———: VOID ENACTMENT. The proviso clause of section 1, article 4, chapter 77, Compiled Statutes of Nebraska, contravenes the provisions of section 4, article IX of the constitution, and is void.

APPEAL from the district court for Lancaster county.
Heard below before FIELD, J.

J. R. Webster, for appellant cited: *Johnson v. Hahn*, 4 Neb., 139; *Peet v. O'Brien*, 5 Id., 362; *Pettit v. Black*, 8 Id., 59, 123; *Lynam v. Anderson*, 9 Id., 378; *Miller v. Hurford*, 13 Id., 13; *Cooley, Taxation*, 13, 359, 364; *Neb. City v. Gas Co.*, 9 Id., 346, and cases.

G. M. Lambertson and *R. D. Stearns*, *contra*, cited: *Kittle v. Shervin*, 11 Neb., 67; *Cooley, Taxation*, 300; *Lynam v. Anderson*, 9 Neb., 379; *Clother v. Maher*, 15 Id., 6; *State v. Graham*, 17 Id., 45; *Wood v. Helmer*, 10 Id., 68; *Turner v. Althaus*, 6 Id., 54; *Otoe Co. v. Brown*, 16 Id., 400.

NORVAL, J.

This action was brought for the foreclosure of a tax lien on lot No. 10 in the N. W. quarter of section 34, township 10, range 6, being one and a quarter acres in said county.

The petition alleges that the land was subject to taxation for state and county purposes, for the years 1874 to 1882 inclusive; that the lot was duly listed and assessed for taxation for each of said years, and taxes were duly levied thereon; that the county clerk prepared the tax lists for each of said years and that taxes became delinquent and have never been paid; that the tax for 1882, November, 1883, being delinquent, the premises were duly offered at tax sale and not sold, and on May 22, 1884, were sold to the county of Lancaster for the sum of \$43.95, including interest and penalty for delinquent tax of the years 1874 to 1882, inclusive. Copy of the certificate by the treasurer

is set forth in the petition; that the certificate has ever remained in the treasurer's custody and is the property of the plaintiff, Lancaster county; that since such sale, tax for years, 1883-4-5-6-7-8 has been levied and remains unpaid; that no redemption of the tax has been made. Then follows a table of the items of county and state tax of each year, and petition proceeds to aver that time for redemption expired May 22, 1888; that three months prior thereto notice was served on the owner and on the person to whom it had assessed, and on the occupant, that unless redemption were made, a foreclosure would be commenced; that the sum due is \$80.21, and five years have not elapsed since the sale; that no proceedings have been had at law to collect the tax, and prayer for foreclosure.

To this petition was filed a demurrer, that:

1. The petition does not state a cause of action.
2. That the claim does not amount to \$200.

This demurrer being overruled, the appellant stood on the demurrer.

After trial, judgment was rendered for the county for \$89 and costs. The defendant appeals.

The first point discussed in the brief of counsel for appellant is that "the court erred in overruling the motion to strike out all items of tax set up prior to and including the year 1872." We fail to find such a motion in the record before us, or that it was passed upon by the trial court. The question, therefore, is not presented for consideration.

The sole question raised is as to the sufficiency of the petition. The remedy given for the foreclosure of a tax lien by a county is found in section 1, article 4, chapter 77, Compiled Statutes, which reads as follows:

"Section 1. That in cases whenever the county commissioners of any county in this state have purchased, or shall hereafter purchase, any real estate for taxes of any kind, delinquent for one year or more, and after the time of redemption from such sale has expired, they may, in the name

County of Lancaster v. Trimble.

of their respective counties, proceed by action, at any time before the expiration of five years from the date of such sale, to foreclose such certificates or liens in the district court of such county and to cause the tract or lot to be sold for the satisfaction thereof, and of all prior and subsequent taxes due thereon, in all respects, as far as practicable, in the same manner and with like effect as though the same were a mortgage executed by the owner or owners of such real estate to the owner and holder of such certificates or liens for the amount therein expressed, together with such subsequent and prior taxes due thereon, and that at such foreclosure sale such county commissioners may, if they deem best, purchase in the name of their respective counties such real estate; *Provided*, That no action shall be brought and maintained by said commissioners unless the amount due on such certificates and for such taxes on said tract or tracts of land shall exceed the sum of two hundred dollars."

It will be observed that the amount claimed in the petition is \$80.21, while the remedy for collection of tax by foreclosure is given a county, by said section, only where the amount involved exceeds \$200. If the provisions of the section quoted are valid and binding, the remedy therein prescribed for the enforcement of a tax must be pursued, and it is exclusive of all others. Counsel for appellee contends that the limitation of the statute restricting the foreclosure of tax liens to amounts in excess of \$200 is inimical to the provision of the constitution prohibiting class legislation, in that the legislature has discriminated against the counties and in favor of the individual holders of tax certificates. The section of the statute under consideration applies alike to all counties of the state; none are released from the operation of its provisions. The fact that the legislature has placed no limitation upon the foreclosure of tax liens by individual holders of tax certificates, does not make the section class legislation. (*State v. Graham*, 16 Neb., 74; *State v. Berka*, 20 Id., 375.)

Again, it is contended that the proviso clause of the section contravenes the provisions of section 4, article IX, of the constitution, which provides that "The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation; nor shall commutation for such taxes be authorized in any form whatever."

The legislature is without power to release any inhabitant or corporation from his or its proportionate share of taxes, nor can it confer such authority upon county commissioners. It has authorized them to purchase real estate at tax sale, but has provided for the foreclosure of tax certificates in their hands only when the amount due thereon exceeds a specified sum. The proviso clause of the section of the statute quoted expressly prohibits county commissioners from foreclosing tax liens when the amount of the lien is \$200 or less. It, in effect, places it in the power of county commissioners to release the taxes upon lots and lands where the amount of the delinquent taxes thereon is not over \$200. All they would have to do to accomplish it is to purchase that kind of property for the county at tax sale. The legislature is powerless to confer such authority. It cannot do indirectly what the constitution prohibits it from doing directly; that is clear. (*Wood v. Helmer*, 10 Neb., 68.)

We are of the opinion that the district court was right in holding that the proviso clause of the section of the statute we have been considering is unconstitutional, and the judgment is

AFFIRMED.

THE other judges concur.

G. J. SQUIRES v. S. H. ELWOOD.

[FILED SEPTEMBER 29, 1891.]

1. **Contract: STIPULATED FORFEITURE: PENALTY OR LIQUIDATED DAMAGES.** A provision in an executory contract to sell and deliver 3,500 sheep at a stipulated price per hundred pounds, that the party making default shall forfeit to the other party \$1,000, is in the nature of a penalty when the actual damages by reason of such default may be readily determined.
2. **Evidence examined, and held,** to sustain the verdict.

ERROR to the district court for Holt county. Tried below before KINKAID, J.

H. E. Clifford, J. J. King, and G. M. Cleveland, for plaintiff in error, cited: 5 Am. & Eng. Ency. of Law, 25, 26, and cases; *Pierce v. Jung*, 10 Wis. 25; *Jaquith v. Hudson*, 5 Mich., 123; *Linde v. Thompson*, 2 Allen [Mass.], 456; *Easton v. Canal Co.*, 13 O., 79; *Cushing v. Drew*, 97 Mass., 445; *Ryan v. Martin*, 16 Wis., 59; 1 Sutherland, Damages, 475-530; *Brennan v. Clark*, 29 Neb., 385.

M. F. Harrington, contra.

NORVAL, J.

On the 4th day of October, 1886, the defendant contracted in writing to sell and deliver to the plaintiff 3,500 sheep at Grand Island between the 15th and 25th days of November, 1886, for which the plaintiff agreed to pay the sum of \$3.12½ per hundred pounds. The defendant having failed and refused to deliver the sheep, or any part thereof, the plaintiff brought this action to recover damages for a breach of the contract. The jury assessed the plaintiff's damages at \$250. The plaintiff prosecutes error to this court.

The contract contains the following provision: "Each of the aforesaid parties further agree that in default of the fulfillment of the aforesaid contract on his part he shall forfeit and pay to the other party the sum of one thousand dollars."

The plaintiff insists that he was entitled to a verdict for the sum of \$1,000 and interest. In other words, that the amount named in the contract to be forfeited by the party who should fail to fulfill the terms of the agreement should be treated as liquidated and assessed damages, and not as a penalty.

In *Brennan et al. v. Clark*, 29 Neb., 385, in laying down the rule governing the construction of a contract, to determine whether the provision therein for the payment of a specified amount by the party in default to the other is to be treated as liquidated damages or a penalty, it is stated in the syllabus that "the court will consider the subject-matter, the language employed, and the intention of the parties. If the construction is doubtful, the agreement will be considered a penalty merely. If damages result from the performance or omission of acts which are certain, or can be ascertained by evidence, the stipulated sum is considered as a penalty; but when the acts or omission occasioning damages are not susceptible of measurement by a pecuniary standard, the sum will be regarded as liquidated damages."

Applying the above rule of construction to the provisions of the contract before us, there can be no doubt that the \$1,000 therein named is merely a penalty, and should not be regarded as liquidated or assessed damages for a breach of the contract. The damages resulting from the breach of such a contract are ascertainable by evidence, and the general rule governing the measure of damages in a case like this, is well understood to be the difference between the contract price of the sheep and the market value of the same, at the time and place where they should have been delivered under the contract.

Squires v. Elwood.

But it is claimed that at the time the contract was broken no sheep of the kind and quality mentioned in the contract were to be had at Grand Island, and hence the sum should be treated as liquidated damages. There is some evidence to the effect that at the time the defendant made default no sheep of the kind called for could be found in the vicinity of Grand Island. That fact would not, however, make it difficult to ascertain the amount of damage sustained by the plaintiff. If no sheep could be obtained at that place, then the measure of the plaintiff's recovery would be the difference between what they would have cost him, had the defendant performed his contract, and the market value at the nearest point where sheep like those called for by the contract could be found, with the expense of shipping them from that point to Grand Island. The case was tried by both parties in the district court upon that theory, and the learned district judge submitted the question of damages to the jury, under proper instructions.

Testimony was given on behalf of the defendant to the effect that sheep of the kind and quality mentioned in the contract and at the date stipulated for delivery could have been bought at South Omaha and shipped to Grand Island at a sum much below the price named in the contract. While the testimony of the plaintiff and his witnesses placed the damages at a much higher sum than was assessed by the jury, we do not feel justified in disturbing the verdict. The evidence would sustain a verdict for nominal damages or one for a larger sum than \$250. The judgment is

AFFIRMED.

THE other judges concur.

CHAPMAN & SCOTT V. W. F. ALLEN.

[FILED SEPTEMBER 30, 1891.]

33	129
52	675
54	797
33	129
58	594
33	129
59	87

Error Proceedings: TIME. Final judgment was rendered on the 8th day of July, 1890, and transcript and petition in error filed in the supreme court on the 9th day of July, 1891. *Held*, That the proceedings in error were not commenced in time.

MOTION to dismiss for want of jurisdiction.

Hazlett & Le Hane, and *Charles O. Bates*, for the motion, cited: *Bemis v. Rogers*, 8 Neb., 150; *French v. English*, 7 Id., 124; *Hollenbeck v. Tarkington*, 14 Id., 430; *Clark v. Morgan*, 21 Id., 673.

PER CURIAM.

Final judgment was rendered in this case on the 8th day of July, 1890, and a transcript and petition in error filed in this court July 9, 1891. A motion is now made to dismiss for want of jurisdiction, the case not being filed within one year from the rendition of the judgment in the court below. The motion must be sustained. In computing time under the Code the first day is to be excluded and the last day included. Under this rule the year would commence to run on the 9th day of July, 1890, and terminate on the 8th day of July, 1891. (*Glore v. Hare*, 4 Neb., 131.)

ANDREW HENRY V. JAMES VLIET ET AL.

[FILED OCTOBER 7, 1891.]

1. **Chattel Mortgage:** CONSIDERATION: A PRE-EXISTING DEBT is a valuable consideration for a chattel mortgage and protects the mortgagee to the same extent as had he paid a new consideration.
2. ———: ———: THE RELEASE OF AN INDORSER or surety of a promissory note, on a pre-existing debt in consideration of a chattel mortgage on the goods of the maker, held, to be a valuable consideration for the mortgage.

ERROR to the district court for Douglas county. Tried below before GROFF, J.

Cornish & Robertson, for plaintiff in error, cited, as to the pre-existing debt as a consideration, cases referred to in the opinion. As to the release of the indorser: *Smith v. Worman*, 19 O. St., 150; *Clark v. Barnes*, 34 N. W. Rep. [Ia.], 419; *Gilchrist v. Gough*, 63 Ind., 576; *Craft v. Russell*, 67 Ala., 9; *Soule v. Shotwell*, 52 Miss., 238; *Gibson v. Connor*, 3 Kelly [Ga.], 47; *Bank v. Wallace*, 12 N. E. Rep. [O.], 439; *Daniel*, Neg. Inst., sec. 829a.

Hall & McCulloch, contra:

Nine state courts and the federal supreme court hold that a pre-existing debt does not make the one securing it a *bona fide* purchaser, as against the prior rights. (*Farley v. Lincoln*, 51 N. H., 577; *Root v. French*, 13 Wend. [N. Y.], 570; *Phelps v. Fockl*, 61 Ia., 340; *Pancoas v. Duval*, 26 N. J. Eq., 445; *Copleand v. Manton*, 22 O. St., 399; *Banks v. Long*, 79 Ala., 319; *Sargent v. Strum*, 23 Cal., 259; *Hohl v. Lynn*, 34 Mich., 360; *Gest v. Packwood*, 34 Fed. Rep. [Ore.], 374; *Straughan v. Fairchild*, 80 Ind., 598; *Bank v. Bates*, 120 U. S., 556.) There are three states holding the contrary. (*Kranert v. Simon*, 65 Ill.,

33	130
36	141
33	130
51	97

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344; *Shufeldt v. Pease*, 16 Wis., 689; *Gibson v. Moore*, 7 B. Mon. [Ky.], 95.) *Goodman v. Simonds*, 20 How. [U. S.], 343, and *McCarty v. Root*, 21 Id., 423, relate to commercial paper. As to the release of the indorser: *Morse v. Godfrey*, 3 Story [U. S.], 364.

COBB, CH. J.

The defendants in error brought their action for the possession of sixty barrels of gasoline, 750 cases of 100 flash oil, and 300 cases two-fifths 150 W. W. oil, laying damages at \$500.

The defendant below made a general denial.

There was a trial to a jury October 29, 1887, with findings that the plaintiffs were entitled to possession; that the defendant was indebted to the plaintiffs \$757.52½ for the goods with damages for detention of five cents. Motion for new trial was overruled and judgment entered on the verdict.

The plaintiff in error claims that on July 21, 1886, L. A. Stewart & Co., of Omaha, executed a chattel mortgage upon their stock of oils and gasoline, including the property in this action, to secure their commercial obligations.

Obligations.	Dated.	Due.	Amount.
First note.....	April 30, 1887.....	Ninety days..	\$5,000 00
Second note....	June 10, 1887.....	Ninety days..	5,000 00
Third note.....	June 22, 1887.....	Ninety days..	2,500 00
Fourth note....	June 25, 1887.....	Ninety days..	2,500 00
First draft.....	July 19, 1887, on W. R. Stewart, Jr.....	.....	850 00
Second draft...	July 20, 1887, on W. R. Stewart, Jr.....	.....	2,617 50
Third draft.....	July 21, 1887, on W. R. Stewart, Jr.....	.....	1,490 00
Amounting to..	.....	.....	\$19,957 50

It is claimed that the notes, except that dated June 25, 1887, were renewals of prior indebtedness, the amount of

Henry v. Vilet.

\$10,000 of which was first loaned January 2, 1886; that the drafts were deposited, as cash, in the Bank of Omaha (owned by plaintiff in error), and that A. L. Stewart & Co. were allowed to draw against them as cash deposited; and all of which were protested for non-acceptance at Des Moines, Iowa. That at the date of the mortgage there was in the Bank of Omaha to the credit of L. A. Stewart & Co. \$274.50; that the notes were signed by L. A. Stewart & Co., and by W. R. Stewart, Jr.; that on July 20, 1887, W. R. Stewart, Jr., of Des Moines, came to Omaha and insisted that L. A. Stewart & Co. should secure their indebtedness to the bank, upon which he was liable as surety. The mortgage was thereupon given, and in consideration of the entire indebtedness being secured, W. R. Stewart, Jr., was released.

It is claimed by the adverse party that the goods in controversy were sold to L. A. Stewart & Co. on condition that they were to be paid for in cash on delivery, or a secured note, or draft accepted by some bank, which conditions were not complied with; that the goods arrived at the Omaha freight depot on July 19, 1887, were taken out the same day into the warehouse of L. A. Stewart & Co., leaving \$830 charges for freight unpaid; that on the next day W. R. Stewart, the surety, appeared and was released, the mortgage was executed on the property thus secured in possession, and on the next day L. A. Stewart & Co. were bankrupts and insolvent.

It is further claimed that in October, 1886, this firm represented, for the purpose of obtaining the goods on credit, that it was worth \$25,000 above liabilities, and was prosperous, which representations were false and made for fraudulent purposes; that the cashier of the bank of Omaha on October 22, 1886, wrote to the defendants in error that "he considered Mr. Stewart reliable, and thought he had \$25,000 in his business."

It is not in evidence that the plaintiff in error was either

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a party to these representations, or that he had notice of the conditions of sale to the failing purchasers. The letter of the cashier was dated nine months prior to the purchase and delivery of the mortgaged property, and if not too remote from the final transaction to have influenced it, there is no sufficient evidence to impeach the truth of the letter or the responsibility of the purchaser at that date.

The first question of error presented is, to what extent a pre-existing debt becomes a valuable consideration within the rule of law which gives protection to a *bona fide* purchaser for value? On the trial the court, of its own motion, instructed the jury:

"IV. That if the defendant took a chattel mortgage upon the goods as security for an antecedent debt, and parted with nothing on the faith of his mortgage or purchase, he would not be, as against the plaintiffs, a *bona fide* purchaser for value," to which the defendant excepted, and requested the court to instruct the jury that "A pre-existing debt is a valuable consideration for a mortgage, and protects the mortgagee to the same extent that he would be protected if he had paid a new consideration at the time the mortgage was given."

This question was fully considered in the case of *Turner, Frazer & Co. v. Killian*, 12 Neb., 580, wherein attaching creditors sought to impeach the validity of a chattel mortgage given to secure a previous debt. The court held "As to attachment creditors of a mortgagor a pre-existing debt, already due, is a good consideration for a chattel mortgage, and protects the mortgagee to the same extent as would a new consideration given at the time of making the mortgage." The court also held that the question of fraudulent intent in the giving of a chattel mortgage was, in all cases, one of fact, and must be raised by suitable pleadings. (Sec. 20, p. 491, Comp. Stats. 1891.) The voluminous testimony does not tend to raise the presumption that the plaintiff in error was a party to a fraudulent mortgage, or to the insolvency of the mortgagor.

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In the case of *Manning v. Cunningham*, 21 Neb., 291, it was held that "A chattel mortgage executed by a mortgagor in possession as owner, although legal title was not to pass to him until the goods were paid for, where such contract of conditional sale was not filed for record, will take precedence over the secret lien of the party claiming to be the real owner of the property."

It does not appear from the evidence that any advantage whatever against the vendor and shipper of the property was taken by the other party to this suit. If the condition of sale was made, as alleged, the defendants in error had ample and customary means of protection in requiring the fulfillment of that condition on delivery of the goods.

The mortgage to the plaintiff in error was therefore a valid instrument, paramount to the vendor's unfortified lien, if the consideration was sufficient.

It is not claimed that the notes and drafts of the mortgagor were supposititious, and it is not denied that the plaintiff in error was a *bona fide* creditor on that account. At the September term of the supreme court of Illinois, in 1872, in the case of *Kranert v. Simon et al.*, 65 Ill., 344, it was held by Judge Breese, and a full bench, that "Where a *bona fide* creditor of one who purchased goods and had possession by means of fraudulent representations took a mortgage without notice as to the fraud, that he was to be regarded as an innocent purchaser and could not be deprived of his rights under his mortgage by a subsequent knowledge of the fraud of his debtor. And the debtor having sold and delivered the goods so purchased, to his creditor, in payment of a pre-existing debt, who accepts them in good faith without notice of the fraud, the creditor will be protected as an innocent purchaser against any claim of the original owner to the same extent he would be had he paid a new consideration for the goods."

If this decision, in an action of replevin, has hitherto

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been maintained, it infolds the present controversy and would seem to be decisive of it. The questions are the same, and the parallel is complete, only lacking the element of fraud. And we also find that a considerable number of the states which have considered the question in their higher courts, have decided in harmony with the doctrine of *Turner v. Killain*, *supra*; *Butlers v. Haughwout*, 42 Ill., 18; *Paine v. Benton*, 32 Wis., 491; *Shufeldt v. Pease*, 16 Wis., 659; *Frey v. Clifford*, 44 Cal., 335; *Gassen v. Hendrick*, 16 Pac. Rep. [Cal.], 242; *Knox v. McFarra*, 4 Col., 586; *Hermann*, Chat. Mort., sec. 52; *Jones*, Chat. Mort., sec. 81; *McMurtrie v. Riddell*, 13 Pac. Rep. [Col.], 183; *Clark v. Barnes*, 34 N. W. Rep. [Ia.], 419; *Goodman v. Simonds*, 20 How. [U. S.], 343; *Bank of Republic v. Carrington*, 5 R. I., 515; *Fair v. Howard*, 6 Nev., 304; *Gibson v. Moore*, 7 B. Mon. [Ky.], 95; *Hayner v. Eberhardt*, 15 Pac. Rep. [Kan.], 168; *Laubheimer v. McDermott*, 6 Pac. Rep. [Mont.], 344.

We have no hesitation in agreeing to the rule that a pre-existing debt does constitute a valuable consideration applicable to commercial obligations. Assuming that the plaintiff in error is unaffected with the equities between the defendant in error and the mortgagor of the goods in controversy, without notice and without evidence of the vendors' lien, we are of the opinion that the chattel mortgage, under these circumstances, was a lawful security to the plaintiff in error for the notes and drafts to become due. It would appear to be for the benefit of trade to give as extended a credit as practicable to the circulation of negotiable paper, that it may pass not only for new purchases, upon transfer, but also as security for pre-existing debts, as in the present instance. The creditor is thus enabled to secure his debt, to extend the credit of the debtor, or forbear legal proceedings to enforce its collection. The debtor has the advantage of using his negotiable securities as the equivalent of money. We can see no substantial reason, therefore, why an adverse

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rule should apply to commercial paper, as security, to that of chattel property.

It may be said that a part of the consideration of the mortgagor was the release of a surety on the notes, that the goods from the owner in possession were not acquired by the plaintiff in error without an equivalent at the time of the transaction, constituting a single feature of the antecedent debt. This view was not rejected by the trial court, but the seventh instruction stated that "if the jury shall find that if the defendant released W. R. Stewart, Jr., from the promissory notes which the chattel mortgage, upon the goods in question and others, was given to secure, with the understanding that the mortgagor should be held, and that the mortgage was given, in consideration of the release, then the defendant did, at the time, part with a valuable consideration in such release for the mortgage, and was an innocent purchaser, for value, of the goods, unless it be found that the defendant had knowledge of the fraudulent intent of the mortgagor at the time of the purchase of the goods."

It is not clear from the evidence of record that the plaintiff in error had knowledge of any fraudulent intent of the mortgagor in the purchase of the goods. The suspicious circumstances presented are not proof of fraud, and are not inconsistent with an honest intent and purpose on the part of the plaintiff in error in all the transactions detailed in evidence.

"Fraud is never to be presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced upon him." (*Clark v. Tennant*, 5 Neb., 549.)

"Fraud will not be imputed where the circumstances and facts upon which it is based may consist with honesty of purpose." (*Clumens v. Brillhart*, 17 Neb., 335.)

Other errors of trial are presented and argued by counsel, not deemed necessary to follow here in order to reach conclusions.

K. & C. P. R. Co. v. Fitzgerald.

The fourth instruction of the court to the jury is held to have been erroneous, misleading, and prejudicial, for which the judgment must be reversed, independent of other errors assigned. The cause will be remanded to the district court to be proceeded with in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

KANSAS & C. P. R. CO. V. JOHN FITZGERALD ET AL.

[FILED OCTOBER 7, 1891.]

33	137
47	227
38	137
49	390
83	187
61	579

1. **INTERVENORS: MUST HAVE DIRECT INTEREST IN RESULT OF SUIT.** To entitle a party to intervene in an action he must have a direct interest in or lien upon the matter in controversy in the suit. A mere creditor, although he may have an indirect interest in the result of the action, has no right to intervene therein.
2. ———: **PETITION: MERE EPITHETS** and charges of fraud, etc., without stating facts showing fraud, do not form a basis for a court of equity to grant relief from the alleged fraud.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

B. P. Waggener, J. L. Webster, and A. R. Talbot, for plaintiffs in error.

T. M. Marquett, contra.

MAXWELL, J.

In May, 1891, John Fitzgerald on his own behalf and that of other stockholders of the Mallory Construction Company, brought an action in the district court of Lancaster county against the defendants, the prayer of the petition being:

K. & C. P. R. Co. v. Fitzgerald.

"Complainant further prays that the Missouri Pacific Railway Company may be enjoined from prosecuting in any other state. This suit was commenced in order to make a record or to obtain a judgment or decree as to the accounts between the Missouri Pacific Railway Company and the construction company, so as to plead in this case; that she be enjoined from prosecuting the suits of Briggs, Receiver, v. Missouri Pacific, the suit commenced in Atchison, Kansas, and is now pending there, and which suit was instigated by the Missouri Pacific; that the said Missouri Pacific may be enjoined from in any way intermeddling with the funds of the said construction company; that the said Missouri Pacific Railway Company be required to make a full answer to this bill of complaint, but not under oath, the same being made under oath being expressly waived, and further prays that there may be had between the Missouri Pacific Railway Company and the Fitzgerald & Mallory Construction Company a fair accounting of their transactions, and that the said Missouri Pacific be required in said accounting to account for all damages caused by the willful violation of her contract with the said construction company, and for all fraud committed by her agents which caused damages to said construction company, and to account for all moneys justly due from said railroad company to said construction company, and shall be required to pay over any and all moneys due from said Missouri Pacific Railway Company to said construction company, which said moneys are to remain under the instructions of the court.

"That inasmuch as the Missouri Pacific, by electing its own directors as directors of the Fitzgerald & Mallory Construction Company, that said directors have incapacitated themselves to act for the construction company; therefore this court is asked to appoint a receiver, and to appoint the receiver now appointed by the district court of Sheridan county, Iowa, whose duty it is to wind up and

pay the debts of the construction company, in order and to the end that whatever sums of money may be due the construction company from the Missouri Pacific may be properly paid out, first, to the creditors of the construction company and costs of this suit; secondly, to be paid to the stockholders, *pro rata*, according to the number of stocks that they hold.

"That inasmuch as all parties desire the winding up of the business of the construction company, that such moneys as shall be due from the said Missouri Pacific Railway Company on final accounting be held by this court for that purpose; that he may be reimbursed for all costs and for all attorneys' fees in this and other suits which, by the willful violation of the said Missouri Pacific Railway Company, he is being obliged to pay out; and for such other and further relief as in equity may be deemed just and right as between the said two companies."

The Missouri Pacific Railway company answered this petition.

On the 20th of June, 1891, the Denver, Memphis & Atlantic Railway Company filed a petition to intervene in the action and set out a copy of the contract, as follows:

"This agreement, made this 28th day of April, 1886, by and between the Fitzgerald & Mallory Construction Company, of the state of Iowa, party of the first part, and the Denver, Memphis & Atlantic Railway Company, a corporation organized under the laws of the state of Kansas, party of the second part,

"Witnesseth: Now therefore it is agreed between the parties hereto as follows:

"The party of the first part agrees to furnish the material and money and construct, as rapidly as may be determined from time to time between the parties hereto, a line of railroad from the east line of Kansas to the west line thereof, and equip the same as the same may be hereafter located.

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"To properly grade the line according to the engineer's survey of the same, and to furnish oak ties on curves, not less than 2,600 to the mile, and steel of not less than fifty-six pounds to the yard.

"To build such depots and stations as may be determined upon by the party of the second part; to build all necessary sidings or turn-outs, and, generally, to construct the same equal to the railroads now being built in southern Kansas.

"And upon the completion thereof to equip the same with, at the least, \$1,000 of rolling stock per mile.

"In consideration thereof, and in payment therefor, the party of the second part agrees to pay to the party of the first part \$16,000 per mile of its full paid capital stock for every mile of completed road to be constructed, and \$16,000 per mile in the first mortgage bonds per mile of simple track of said road; said bonds to be of the denomination of \$1,000 each, or of such denominations as may be agreed upon by the parties hereto and bearing interest at the rate of six per cent per annum, payable in the city of New York and state of New York, where the principal is also payable. Said bonds to be issued for the construction of said road under this contract shall be dated July 1, 1888, and run thirty years from date, and to be secured by trust deed of even date herewith, duly executed by the party of the second part to the Farmers Loan & Trust Company therein named, on the aforesaid line and branches thereof.

"The said Denver, Memphis & Atlantic Railway Company hereby agrees to issue and deliver to said party of the first part the said stock and bonds at the rate hereinbefore set forth at such times and in such settlement as the said Fitzgerald & Mallory Construction Company require in order to obtain the money necessary to perform this contract.

"And also to deliver to said first party all municipal and

county bonds voted and to be voted in aid of said railway, and all donations thereto as soon as earned and delivered to said second party, and said Fitzgerald & Mallory Construction Company covenants and agrees to proceed forthwith in the execution of this agreement and to construct said line as rapidly as possible according to the surveys now made or to be hereafter determined upon, and said party of the second part agrees to procure, or cause to be procured, the right of way for said line of railroad at the proper times, in advance of the work, so as not to impede or delay construction, which right of way shall be paid for by said construction company.

"In witness whereof, the said Fitzgerald & Mallory Construction Company, by their president, has hereunto set their hands and seal, and said party of the second part has caused its corporate name to be signed by its president and its corporate seal to be attached by the secretary the day and year first above written. Executed in duplicate." Which contract was duly signed.

This motion was overruled, the order being as follows:

"The Denver, A. & M. Co. claims to be a creditor of the defendant, the construction company, an issue not yet adjudicated; plaintiff sues for an accounting upon a contract between the defendants as a stockholder, alleging that for various accounts the railway company is debtor to the construction company in the sum of \$1,500,000. The railway company denies that it is indebted to the construction company in any sum whatever. In the determination of the issues joined herein the intervenor is not a necessary party nor a proper party, and its application to intervene is denied and its motion therefore overruled, to which it duly excepts.

On the 3d of July, 1891, the district court not being in session, the Kansas & Colorado Pacific Railway Company filed in the district court of Lancaster county a petition to intervene in the case. This petition, accompanied with the

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above contract, on the motion of Fitzgerald's attorneys, was stricken from the files.

The attorneys for the proposed intervenor thereupon moved to strike the previous order of the judge overruling the motion of the Denver, Memphis, etc., Railway Company to intervene, which motion was overruled and the court refused to permit the plaintiff herein to intervene. These rulings are now assigned for error.

To authorize a party to intervene he must have an interest of such a direct and immediate character that he will either gain or lose by the direct legal operation of and effect of the judgment. This interest must be one arising from a claim to the subject-matter of the action or some part thereof, or a lien upon the property or some part thereof. A mere creditor has no right to intervene in an action, although he may have an indirect interest in the result of the suit. (*Gasquet v. Johnson*, 1 La. R., 425; *Horn v. Volcano, etc., Co.*, 13 Cal., 62; *Bronson v. La Cross R. Co.*, 2 Black [U. S.], 524; *Welborn v. Eskey*, 25 Neb., 194.) The petition for intervention, while it contains many epithets and assertions of fraud, yet it fails to set forth any facts showing such fraud or that the proposed intervenor is more than a creditor. This being the case, the proposed intervenor is interested only in the assets of the debtor, and after the rendition of judgment, if one should be rendered in favor of the defendant, may apply in some of the modes provided by law for the application of sufficient to pay his claim, or if there is not sufficient to pay the same in full, then for a *pro rata* share thereof.

There was no error committed in overruling the petition to intervene, and the judgment of the court below is

AFFIRMED.

THE other judges concur.

OMAHA & R. V. R. CO. v. ELIZA CHOLLETTE.

[FILED OCTOBER 7, 1891.]

1. The testimony being conflicting it was properly submitted to the jury, and the court did not err in refusing to instruct to find a verdict for the defendant.
2. The law of a case having been declared on a former hearing, will not be recapitulated in the syllabus.
3. Instructions set out in the opinion, *held*, to state the law correctly.

ERROR to the district court for Saunders county. Tried below before POST, J.

J. M. Thurston, and *W. R. Kelley*, for plaintiff in error, cited, on the question of contributory negligence: *Pa. R. Co. v. Aspell*, 23 Pa. St., 147; *C. B. & Q. R. Co. v. Hazard*, 26 Ill., 373; *C. B. & Q. R. Co. v. Dewey*, Id., 255; *Burrows v. R. Co.*, 63 N. Y., 556; *Bon v. Ry. Pas. Ass'n.*, 56 Ia., 664; *Hickey v. R. Co.*, 14 Allen [Mass.], 429; *Nichols v. R. Co.*, 106 Mass., 463; *Harvey v. R. Co.*, 116 Id., 269; *R. Co. v. Bangs*, 47 Mich., 470; *R. Co. v. Stratton*, 54 Ill., 133; *I. C. R. Co. v. Stratton*, 78 Id., 88; *R. Co. v. Randolph*, 53 Id., 510; *R. Co. v. Scates*, 90 Id., 586; *Secor v. R. Co.*, 10 Fed. Rep. [Ill.], 15; *Raben v. R. Co.*, 74 Ia., 732; *Jeffersonville R. Co. v. Hendricks*, 26 Ind., 228, 232; *Morrison v. R. Co.*, 56 N. Y., 302-5; *Bailey v. R. Co.*, 49 Id., 77; *Nichols v. R. Co.*, 38 Id., 131; *Lucas v. R. Co.*, 6 Gray [Mass.], 64; *Gavett v. R. Co.*, 16 Id., 501.

S. H. Sornborger, *contra*, cited, on the same question: 2 Thomp., Neg., 1175, sec. 19; *Chollette v. R. Co.*, 26 Neb., 161; *Secor v. R. Co.*, 10 Fed. Rep. [Ill.], 15.

MAXWELL, J.

This case was before this court in 1889, and is reported in 26 Neb., 159, the judgment of the court below being reversed.

33	143
36	650
37	254
38	143
38	236
38	143
41	583
33	143
44	460
33	143
48	99
48	167
33	143
58	681
58	682
38	143
59	694

O. & R. V. R. Co. v. Cholletta.

On the second trial the jury returned a verdict in favor of the defendant in error for the sum of \$4,000, upon which judgment was rendered. The jury made special findings of fact as follows :

"First—Was the train, upon which the plaintiff was a passenger at the time when her injuries were received, stopped at the platform at the passenger station where the accident occurred, for the purpose of receiving and discharging freight and passengers?

"Ans. Yes.

"Second—Did the train, after stopping at the platform of the passenger station where the injuries complained of were received, begin to move out from the station before the plaintiff descended the steps for the purpose of alighting therefrom?

"Ans. Yes.

"Third—Did the plaintiff voluntarily descend the steps for the purpose of alighting therefrom while the train was in motion?

"Ans. Yes.

"Fourth—Was the plaintiff warned by the conductor or trainmen and by bystanders not to get off the car while the same was in motion?

"Ans. No.

"Fifth—Did the plaintiff leave the car while the train was in motion by stepping down the steps of the car platform after having been warned not to do so by the railway company's servants and employees and others?

"Ans. No.

"Sixth—Could the plaintiff, by the exercise of such care with respect to alighting or not alighting from the train when the same was in motion, as an ordinarily prudent person would have exercised under the circumstances, have avoided the injury complained of?

"Ans. No.

H. L. LITRELL,
"Foreman."

The testimony upon the principal questions involved is conflicting and therefore proper to submit to a jury.

The plaintiffs in error complain of the instructions, which must be construed together. Those given by the court on its own motion are as follows :

“The particular wrong, which charges as the ground of the action, is that the said defendant negligently and carelessly failed and refused to allow her a reasonable time to alight from its cars at said station, and that it negligently and carelessly started its said cars, in which she was a passenger, before she had a reasonable time to alight therefrom, and that in consequence thereof she was violently thrown down upon the platform at said station, by reason of which she was bruised and otherwise injured. She charges that in consequence of said injuries she has suffered great pain and is permanently sick and afflicted, to her damage.

“Second—The defendant for answer denies all the allegations of negligence in plaintiff’s petition, and charges that whatever injuries were received by her, if any, were in consequence of her own negligence in attempting to alight from said train while the same was in motion, contrary to the instructions and cautions of its agents and servants and others given at the time in question. The plaintiff for reply denies all the allegations of negligence on her part.

“Third—The burden of proof in this case is upon the plaintiff in the first instance, and in order to recover she must establish the truth of the material allegations of her petition by a preponderance of testimony. If the preponderance is with the defendant, or if the testimony is evenly balanced, you would have to find for the defendant.

“Fourth—The burden or preponderance of testimony does not necessarily depend upon the number of witnesses who have testified for the respective sides. In determining the question you are at liberty to take into consideration the interest of the witnesses, or any of them, in the

result of your verdict, their relationship to the parties in interest, if any, their intelligence, their means or opportunities for knowing the truth of the matters about which they testify, the reasonableness or unreasonableness of their stories, the extent to which they are corroborated by other witnesses, if at all. You may note the appearance and demeanor while upon the witness stand before you; and observe the candor and fairness with which they testify or the want of these qualities, and determine for yourselves the weight or credit which should be given to the testimony of the several witnesses.

"Fifth—By section 3, art. 1, of chapter 72 of our Compiled Laws it is provided as follows: 'Every railroad company as aforesaid shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of the said road actually brought to his or her notice.' Excepted to by defendant.

"Sixth—The term criminal negligence, as it is used in the statute above quoted, is defined to be gross negligence. It is such negligence as would amount to a flagrant and reckless disregard of her own safety and amount to a willful indifference to the injury liable to follow. Excepted to by defendant.

"Seventh—Should you find from the testimony that the train on which the plaintiff was riding did not stop at Elkhorn station a sufficient time to permit plaintiff to alight therefrom, and that she afterwards attempted to step or leap therefrom while said train was in motion, you should next determine whether she was, in trying to alight while the train was in motion, guilty of such gross or criminal negligence as is defined in the last paragraph. Excepted to by defendant.

"Eighth—Should you, however, find that the plaintiff

had a reasonable and sufficient time to alight from said train and reach the depot platform in safety while said train was at rest, then the defendant would not be liable in the action, and you should so find. Excepted to by defendant.

"Ninth—Should you find that plaintiff did not have a sufficient time to alight from the said train as above explained, but that she was guilty of gross or criminal negligence in alighting while the train was in motion, you will find for the defendant. Excepted to by defendant.

"Tenth—Should you find that defendant's train did not stop at Elkhorn station long enough to enable the plaintiff to alight from the car in which she was riding, and that she was not guilty of such gross or criminal negligence as here defined in attempting to alight while the train was in motion, you should next determine from the testimony whether or not the plaintiff, at the immediate time of the injury in question, was guilty of violating any express rule or regulation of defendant company for the safety of passengers upon its trains, and whether she had actual notice of such rule or regulation.

"Eleventh—If you find that at and prior to the time in question there existed an express rule or regulation of the defendant company that passengers should not stand upon the platform of the cars while the train was in motion, and that such rule or regulation was actually before that time brought to plaintiff's knowledge by means of notices posted upon the doors of defendant's cars, and if she went upon the platform of the moving train in violation of such express rule or regulation and attempted to step therefrom to the depot platform, she could not recover in this case; but if she was in the act of leaving the train at the time the train started, then the standing upon such platform would not be a violation of such rule or regulation, although the train may have been in motion. Excepted to by defendant.

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"Twelfth—The fact, if it is a fact, that the defendant's train did not stop at the station long enough to enable plaintiff to alight therefrom, would not of itself excuse plaintiff or justify her stepping from the train while in motion.

A. M. Post, *Judge*."

The court, also at the request of the plaintiff, gave the following instructions:

"You are instructed that a passenger upon a railroad train, is entitled to a reasonable time to leave or alight from the car in which he is riding, when a train is stopped for that purpose, and when reasonable time is not in fact given in which to alight in safety, if, in attempting to do so, injuries result to him, he is entitled to recover from the railroad company for such injuries, unless in doing so he is guilty of criminal negligence, as elsewhere defined in these instructions, or unless in doing so he is violating some express rule or regulation of said railroad actually brought to his notice. Excepted to by defendant.

"If, from the evidence in this case, you find that the defendant's train did not stop at the station at Elkhorn long enough to enable the plaintiff, Eliza Chollette, to leave the car in which she was riding, and reach the platform while the train was standing and before it was again started, and that she was thrown or precipitated therefrom, or that she stepped therefrom onto the depot platform after the train was started and was in motion, it is for you to say, upon consideration of all the evidence upon that question, whether she was guilty of criminal negligence, as elsewhere defined in these instructions. Excepted to by defendant.

"If you find from the evidence in this case that the plaintiff, or her husband in her behalf, applied to the agent or person in charge of the station office situated on the defendant's right of way at Wahoo for a ticket for her transportation to Elkhorn, and that such agent or person so in charge of said station office, in response to such application,

sold her, or her husband in her behalf, a local book ticket for her transportation to Elkhorn, and that she boarded a passenger car running upon defendant's line of road, in pursuance of the direction of persons in charge of said car the ordinary carriage of passengers riding over said road, or of the train of cars, and that the same was used for and continued in said car without changing cars until she reached her destination at Elkhorn, such facts would constitute a valid and binding contract and undertaking by the defendant to safely carry the plaintiff from Wahoo to Elkhorn, notwithstanding the fact that Elkhorn is not situated upon defendant's line of railroad, and is situated upon the U. P. railroad at a point several miles beyond the terminus of the defendant's road.

"Given with this addition: That the liability of this defendant in such case would be the same, neither greater nor less than if such injury had occurred at a station on their own line of road.

A. M. POST, *Judge*."

These instructions, taken together, state the law correctly. The law of this case was settled on the former hearing and need not be repeated here. The plaintiff in error asked the court to direct a verdict for the defendant below. This instruction was properly refused, as there were questions of fact involved in the case proper to be submitted to a jury. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

CHARLES K. LABAREE V. JOHN KLOSTERMAN ET AL.

[FILED OCTOBER 7, 1891.]

33	150
39	807
33	150
41	287

33	150
45	806

33	150
47	775
48	506

33	150
58	536

1. **Review: MOTION FOR NEW TRIAL: THE ASSIGNMENT** in a motion for a new trial, of errors of law occurring at the trial, is sufficient to entitle a party to review the rulings of the district court on the admission or rejection of testimony.
2. **Evidence: COLLECTION REGISTERS** or loan registers are inadmissible in evidence as books of account.
3. **Witnesses: REFRESHING MEMORY.** A witness may refresh his memory from a memorandum made at or near the time the transaction mentioned in it took place, even though the memorandum was not made by himself, if, after seeing it, he has a personal recollection of the facts therein stated, and can testify of them of his own recollection.
4. ———: ———. Such memorandum is admissible without the corroborating testimony of the person who made the same, if beyond the reach of the process of the court, his whereabouts being unknown, upon proof of his handwriting.
5. **Evidence: ERROR CURED.** Error cannot be predicated upon the exclusion of testimony, where it is subsequently received in evidence.
6. **Principal and Surety: BOND GUARANTEEING PAYMENT OF NOTES.** The firm of W. & W. gave a bond to L., with sureties, by the terms of which the sureties guaranteed the payment, thirty days after their maturity, of all notes secured by chattels or real estate, which W. & W. should sell to L. *Held*, That the sureties are not liable for the payment of any note transferred by their principals to the obligee in the bond, for a consideration other than money at the time paid or promised to be paid.
7. **Instructions: NON-PREJUDICIAL ERROR.** A verdict will not be set aside for the giving of an instruction uncalled for by the evidence, if not prejudicial to the rights of the party complaining.
8. ———: **INFERENCE.** When a material fact may be inferred from the testimony in a case, it is proper to submit such inference to the jury by instruction.
9. ———. *Held*, No reversible error in the charge of the court.

ERROR to the district court for Lancaster county. Tried below before APPELGET, J.

O. P. Mason, Robert Ryan, and F. W. Lewis, for plaintiff in error, cited: As to the admission of the collection register: *Martin v. Scott*, 12 Neb., 48; *Masters v. Marsh*, 19 Id., 466; *Van Every v. Fitzgerald*, 21 Id., 36; *Pollard v. Turner*, 22 Id., 366. As to the defense of usury: *Green v. Kemp*, 13 Mass., 515; *Bridge v. Hubbard*, 15 Id., 96, 103; *French v. Shotwell*, 5 Johns. Ch. [N. Y.], 555; *Reading v. Weston*, 7 Conn., 409; *Loomis v. Eaton*, 32 Id., 550; *Baskins v. Calhoun*, 45 Ala., 582; *Fielder v. Varner*, Id., 429; *Williams v. Tilt*, 36 N. Y., 319; *Billington v. Wagoner*, 33 Id., 31, 34; *Post v. Bank*, 7 Hill [N. Y.], 391; *Stephens v. Muir*, 8 Ind., 352; *Outchen v. Coleman*, 13 Id., 568; *Austin v. Chittenden*, 33 Vt., 553; *Ransom v. Hays*, 39 Mo., 445; *Draper v. Emerson*, 22 Wis., 147.

Marquett, Deweese & Hall, and S. H. Steele, contra, cited, as to the admissibility of the collection register: *Milligan v. Butcher*, 23 Neb., 683; *Volker v. Bank*, 26 Id., 603. As to the motion for a new trial: *Harvey v. Osborn*, 55 Ind., 535; *O., etc., R. Co. v. Hemberger*, 43 Id., 462; *Sherlock v. Alling*, 44 Id., 184; *Meek v. Keene*, 47 Id., 77; *Midland, etc., R. Co. v. McCartney*, 1 Neb., 402; *Cropsey v. Wigenhorn*, 3 Id., 117; *Mills v. Miller*, 2 Id., 317; *Shaffer v. Maddox*, 9 Id., 211; *Tomer v. Densmore*, 8 Id., 391; *Cook v. Pickerell*, 20 Id., 435. As to the instructions: *O'Hara v. Wells*, 14 Neb., 403; *Bartling v. Behrends*, 20 Id., 211; *Campbell v. Holland*, 22 Id., 607. As to the construction of the bond and liability of sureties for notes transferred on original consideration: *Brandt, Suretyship & Guaranty*, secs. 9, 79; 1 Benj., Sales, secs. 1, 2; *Williamson v. Berry*, 8 How. [U. S.], 544; 1 Parsons, Contracts [7th Ed.], sec. 2, p. 521; *Huthmacher v. Harris*,

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38 Pa. St., 498; *Mackanness v. Long*, 85 Id., 158, 163; *Edwards v. Cottrell*, 43 Ia., 194, 204; *Wittkowsky v. Wasson*, 71 N. Car., 451; *Mitchell v. Gile*, 12 N. H., 390; *Vail v. Strong*, 10 Vt., 457; *Elwell v. Chamberlin*, 31 N. Y., 624; *Long v. Fuller*, 21 Wis., 123; *Shire v. Bank*, 70 Mo., 528; *Speigle v. Meredith*, 4 Bis. [U. S.], 123; Winfield, Adjudged Words & Phrases, 68; *Com'rs v. Davis*, 12 Bush [Ky.], 241; *Ernst v. Cummings*, 55 Cal., 179; *Bronson v. Noyes*, 7 Wend. [N. Y.], 188; *Magee v. Kast*, 49 Cal., 141; *Cook v. Bradley*, 7 Conn., 57; *Bean v. Burbank*, 16 Me., 458; *Brown v. Adams*, 1 Stewart [Ala.], 51; *People v. Shall*, 9 Cow. [N. Y.], 778; *Lees v. Whitcomb*, 2 Mo. & P. [Eng.], 86; *Sykes v. Dixon*, 9 A. & E. [Eng.], 693; *Bates v. Cort*, 3 Dow. & Ry. [Eng.] 676; *James v. Williams*, 5 B. & Ad., 1109; *Schermerhorn v. Vanderheyden*, 1 Johns. [N. Y.], 139; *Emery v. Chase*, 5 Greenl. [Me.], 232; *Howes v. Barker*, 3 Johns. [N. Y.], 506; *Veacock v. McCall*, Gilpin [U. S.], 329; *Cutter v. Reynolds*, 8 B. Mon. [Ky.], 596; *Mitchell v. Williamson*, 6 Md., 210; 2 Daniel, Neg. Inst. [3d Ed.], sec. 1316, 1318, 1319; *Proctor v. Keith*, 12 B. Mon. [Ky.], 252; *Overdier v. Wiley*, 30 Ala., 709; *Jones v. Miller*, 12 Mo., 408; *Owen v. Stevens*, 78 Ill., 462; *Parmelee v. Thompson*, 45 N. Y., 58; *Peelman v. Peelman*, 4 Ind., 612; *Crowhurst v. Laverack*, 16 Eng. Law & Eq., 499; *Gibson v. Renne*, 19 Wend. [N. Y.], 389; *Miller v. Holbrook*, 1 Id., 317; *Stilk v. Myrick*, 2 Camp. [Eng.], 317; *Reynolds v. Nugent*, 25 Ind., 328; *McCarthy v. Bldg. Ass'n*, 61 Ia., 287; *Westhead v. Sproson*, 6 Hurl. & N. [Eng.], 728; *Morrell v. Cowan*, 6 L. R. Ch. Div. [Eng.], 166; *Boyd v. Moyle*, 2 C. B. [Eng.], 644.

NORVAL, J.

This suit was brought by the plaintiff in error against J. Robert Williams and W. H. Westover, as principals, and John Klosterman, Abel Hill, and Archibald F. Coon, as

Labaree v. Klosterman.....	150

sureties, upon a certain bond given by the defendants to one Henry E. Lewis, of which the following is a copy:

"Know all men by these presents, that we, W. H. Westover and J. Robert Williams, of David City, Butler county, Nebraska, as principals, and Abel Hill, J. Klosterman, and A. F. Coon, as sureties, are held and firmly bound unto Henry E. Lewis, of Lincoln, Lancaster county, Nebraska, his heirs and assigns, in the sum of \$10,000. For the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, our executors, and assigns, firmly by these presents. Given under our hands and seals this 15th day of November, A. D. 1883.

"The condition of this obligation is such, that whereas, the said W. H. Westover and J. Robert Williams are about to sell to said Henry E. Lewis within the next two years, promissory notes secured by chattel or real estate mortgages, and to indorse the said notes to the said Lewis, and have entered into an agreement as parties of the first part, with the said Lewis as party of the second part, for good and sufficient consideration therein expressed, to guarantee to said Lewis, and to his assigns, payment within thirty days after maturity of each and every one of the promissory notes so sold to said Lewis by them, and indorsed as aforesaid, with accrued interest, and to collect the said notes without expense or charge therefor to the said Lewis, or the assigns thereof, and to waive protest, demand, and notice of non-payment on each and every one of the notes so sold to the said Lewis by them, and have agreed with the said Lewis, if any of the said notes are not paid within thirty days after maturity, to forthwith pay such note or notes to the said Lewis, or his assigns, and to look to the maker or makers thereof for payment to them of the same, and have expressly stipulated that the said agreement shall be of the same force and effect between the said parties of the first part and the assignees of notes sold to said Lewis by said parties of the first part,

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whether assigned with or without recourse, as between said parties of the first part and said Lewis himself:

"Now, therefore, if the said W. H. Westover and J. Robert Williams shall pay, or cause to be paid, to the said Henry E. Lewis, or his assigns, within thirty days after their maturity, each and every one of the said notes sold to the said Lewis, as aforesaid, with the interest thereon accrued, and shall faithfully perform all the above mentioned agreements, the above obligation to be void; otherwise to be and remain in full force and virtue.

"W. H. WESTOVER.

"J. ROBERT WILLIAMS.

"ABEL HILL.

"J. KLOSTERMAN.

"A. F. COON.

"Sealed and signed in the presence of

"A. G. WOLFENBARGER."

The plaintiff alleges, in effect, that said Westover and Williams sold to said Lewis notes against the following named parties and for the amounts named, to-wit:

E. F. Ruth.....	\$308 40
W. A. Baxter	117 75
S. S. McElvain.....	105 87
Charles E. Warren	130 53
Richard Duval.....	186 95
John Esch.....	249 81
A. S. Wright	127 75
J. W. Taylor	118 90
Charles H. Simpson.....	633 17
S. J. Herdman	91 45
Henry Draper.....	46 00
James Dowers.....	85 90
P. S. Gaskell.....	54 00
John Baker.....	120 00
John Bredwell.....	120 35

That each of said notes, except the one made by Simpson, was indorsed "Pay to H. E. Lewis, or order, protest, demand, and notice of non-payment waived, Westover & Williams;" that said Lewis sold and assigned all of said notes to the plaintiff; that said notes are more than thirty days past due, and no part thereof has been paid, and that there is due thereon from the defendants to the plaintiff the sum of \$2,098.37, with interest from November 1, 1885.

The defendants Hill, Coon, and Klosterman filed an answer, which consists of

First—A denial of each allegation of the petition not expressly admitted; admits the signing of the bond, but denies its delivery, and alleges that the bond was without consideration.

Second—Alleges that the bond was delivered to Lewis with the express understanding and agreement that said Lewis would furnish to said Westover & Williams five to ten thousand dollars more money to handle and loan on chattel mortgage security, which was the only thing that caused said bond to be executed and delivered; that Lewis never furnished any money whatever to loan.

Third—Denies that the notes described in the petition were sold by Westover & Williams to Lewis; that if Lewis paid any consideration for the notes, he got them by exchange for other notes or in payment of a debt claimed to be due him from Westover & Williams.

Fourth—That none of the notes mentioned in the petition were secured by mortgage.

Fifth—That the arrangement whereby the notes were acquired was simply a device to cover the exaction of usury.

Sixth—That the notes given by E. F. Ruth, S. S. McElvain, Charles E. Warren, John Bredwell, Richard Duval, John Esch, A. S. Wright, Jr., J. W. Taylor, S. J. Herdman, Henry Draper, James Dowers, P. S. Gaskill,

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and John Baker were paid by the makers thereof and by Westover & Williams. That the note of Charles H. Simpson was never in the hands of Westover & Williams, and was never by Lewis bought from Westover & Williams; that none of the notes were secured by mortgage; that the notes of W. A. Baxter, S. S. McElvain, and H. S. Wright Jr., were renewals of old notes held by Lewis, and that Westover & Williams only acted as the agents of Lewis in taking them.

The reply admits the payment of the Bredwell note; denies all other averments of the answer, and alleges that the renewal of the Simpson note was made with the written consent of the defendants Klosterman and Coon; that their liability should not be varied from what it had been on the original note, if thereon liable.

A verdict was returned for Coon, Hill, and Klosterman, and one in favor of the plaintiff and against Westover & Williams.

Numerous rulings of the trial judge, on the admission or exclusion of testimony, are assigned for error in this court. The defendants in error contend that these rulings cannot be reviewed, for the reason that the alleged errors were not specifically pointed out in the motion for a new trial. The third assignment in the motion is "For errors of law occurring at the trial duly excepted to." This assignment does not specifically point out the rulings complained of, and in several cases reported in the earlier Nebraska Reports, commencing with *M. P. Ry. Co. v. McCartney*, 1 Neb., 402, it has been held that such an assignment in a motion for a new trial is too general to challenge the attention of the trial court to its rulings on the admission or rejection of testimony; and that the motion must specifically point out the evidence admitted or excluded. But these decisions are not applicable to the statute now in force governing motions for new trials. It will be observed that the assignment in the motion in this case is in

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the language of the eighth, or last subdivision of section 314 of the Code, and is one of the grounds upon which a new trial may be granted. While it is true this section was in force at the time the decisions referred to were made, yet the legislature subsequently, in 1881, amended section 317 of the Code by providing that it shall be sufficient, in assigning the grounds of the motion, to state the same in the language of the statute, and without further or other particularity. It is evident that it is within the scope and meaning of the statute that all errors occurring during a trial, to be available in the supreme court, must be preserved by bill of exceptions, such as the rulings on the admission or rejection of testimony, are covered by the assignment of "errors of law occurring at the trial." This change in the statute, however, does not obviate the necessity of pointing out specifically, in the petition in error the particular rulings which are claimed to be erroneous. The objection of the defendants in error to our reviewing the rulings of the court below, in admitting or rejecting evidence, must be overruled.

The first error assigned in the petition in error is that the court erred in not permitting Henry E. Lewis to testify as to the description of the note given by S. J. Herdman. It appears that the Herdman and several of the other notes mentioned above had been sent to Westover & Williams for collection, and were not, at the time of the trial, in the possession of the plaintiff. It appears, from page 33 of the bill of exceptions, that the court excluded the testimony of Lewis, giving a description of the Herdman note, on the ground that the witness stated that he was testifying from a memorandum recently made by his clerk from the witness's loan register, or from the petition filed in the case. The record discloses that afterwards the court reconsidered its ruling and Mr. Lewis was permitted to testify fully as to the date of the note, amount, when due, and that it was indorsed in the usual way by J. Robert Will-

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iams, and Westover & Williams. If there was any error in the first ruling, it was afterwards cured by admitting the testimony previously excluded.

The second assignment is "that the court erred in admitting in evidence the so-called note of James Dowers, to which was no signature." The objection to the introduction of the note was on the ground of incompetency. It was one of the notes mentioned in the petition which the defendants claim was paid. They called the maker of the note, who testified that he paid it to the firm of Westover & Williams; that it was by them delivered to him, and he tore off his signature. The note was clearly admissible as tending to show payment. But the record discloses that the plaintiff's objection to the admission of the note in evidence was sustained. •The defendants are the only ones who were prejudiced by the ruling, and they are not complaining.

The third, fourth, fifth, sixth, seventh, ninth, tenth, and eleventh assignments present the same question as the admissibility of certain entries in the loan register and the collection register of Westover & Williams, with reference to the notes of Herdman, Baxter, McElvain, and Wright. Each of the notes the witness H. E. Lewis testified he had purchased of Westover & Williams during the time the bond was in force. Nelson Westover testified that he bought the Herdman note from Westover & Williams, and that he sold, indorsed, and transferred the same to Mr. Lewis. W. H. Westover gave testimony to the effect that the Herdman note was sold by his firm to Nelson Westover; that the firm afterwards received it back for collection from him, and not from Mr. Lewis. For the purpose of corroborating the testimony of the two Westovers, and to show that Mr. Lewis never received the note in question from Westover & Williams, entries in the loan and collection registers of that firm were received in evidence, over the objections and exceptions of the plaintiff.

With like objections and exceptions other entries contained in the same books were introduced to show that the Baxter, McElvain, and Wright notes, mentioned in the petition, were renewals of former notes made by the same parties and owned by Mr. Lewis.

The testimony was upon important issues involved in the case, upon which there was a sharp conflict in the evidence. It is obvious that if Lewis did not purchase these notes from Westover & Williams, the plaintiff could not recover therefor in this action. If the Herdman note was sold by the principals in the bond to Nelson Westover, and by him to Lewis, it could not have been purchased by Lewis of Westover & Williams, as he testified.

It is equally clear if Westover & Williams renewed any of the old notes sold by the firm of Roberts, Westover & Williams to Lewis, and such renewals, when turned over to Lewis, were indorsed by Westover & Williams, that the sureties are not liable for their payment. They never bound themselves to pay such notes. The extent of the undertaking of the sureties was to pay such secured notes as their principals should sell to Lewis if the same were not paid within thirty days after their maturity.

The material inquiry, therefore, is, were these books admissible in evidence under section 346 of the Civil Code? It provides that "Books of accounts, containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility: First—The books must show a continuous dealing with persons generally, or several items of charges at different times against the other party in the same book. Second—It must be shown by the party's oath, or otherwise, that they are his books of original entries. Third—It must be shown in like manner that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such

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proof. Fourth—The charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made." Neither of the books contain charges against the plaintiff, Mr. Lewis, nor any one else. Each page contains several columns and numerous lines across the page. There is a heading at the top of each column to explain the entries therein. The heading is as follows: "No., Payer's Name, P. O. Address, Kind of Claim, Date of Instrument, Amount, Interest From, Due When, From Whom Received, Their Number, Original Payee's Name, When Received, To Whom We Remit, P. O. Address." The purpose of making the entries in these books, or registers, as they are called, was to keep track of collections received by the firm and loans made by it. Neither of the books received in evidence is a "book of account" within the meaning of the section quoted above.

The same question was decided adversely to the defendants in error in *Martin v. Scott*, 12 Neb., 42. The defendant offered in evidence the note register or bills receivable of the decedent's bank, which was admitted over the objection of the plaintiff. The court in the opinion says: "The note register, or collection register, or, as it is called in this case, the book of bills receivable, kept by a bank or banker, is not a 'book of account' in the sense in which that term is used, either in the statute or at common law, as they do not contain 'charges by one party against the other made in the ordinary course of business,' and in no case are account books evidence of any transactions even between the parties other than goods, wares, or merchandise sold or delivered, and work, labor, or services performed."

In *Van Every v. Fitzgerald*, 21 Neb., 36, it was held that a time book is not admissible as a book of account. It is evident that the loan register and collection register were used by Westover & Williams as a memoranda for their

own private use, and were not admissible in evidence as books of accounts.

But it is claimed that the books were competent as memoranda, and entitled to be received in evidence. The proof shows that most of the entries in the books were made by A. G. Wolfenbarger, who was the book-keeper of Westover & Williams; that he has not been in their employ since 1884, and his whereabouts is not known. It also appears that the entries were made at the time of the transactions to which they refer. The preliminary proof was sufficient. A witness may refresh his memory from a memorandum made at or about the time the transaction mentioned in it took place, even though not made by himself, if, after seeing it, he remembers the facts therein stated, and can testify to them of his own recollection. (1 Greenleaf, sec. 436; *Hill v. State*, 17 Wis., 697; *Riggs v. Weise*, 24 Id., 545.) Such memorandum is admissible without the corroborating testimony of the person who made the same, if beyond the reach of the process of the court, his whereabouts being unknown, upon proof of his handwriting. (*Chaffee v. U. S.*, 18 Wall. [U. S.], 516; *Vinal v. Gilman*, 21 W. Va., 301.) Under the proofs, as made, the books were properly received in evidence.

It is claimed that "the court erred in permitting Westover to testify that when he wrote Lewis 'to charge our account with the following collections,' that they had not at all times been either collected, renewed, or paid in cash." The evidence shows that some time prior to the giving of the bonds in suit the firm of Roberts, Westover & Williams had given Lewis a bond in the sum of \$5,000 containing similar conditions to this. The firm transferred to Lewis several thousand dollars in notes, and guaranteed their payment. The firm was dissolved in the fall of 1883, Mr. Roberts retiring. Subsequently the bond declared on was given, and Lewis sent to Westover & Williams for collection several of the notes which had been

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taken under the first bond, and charged them with the same. It is also undisputed that Mr. Lewis neither sent nor paid them any money after the last bond was given. It was the theory of the plaintiff that Westover & Williams had collected the notes placed in their hands for collection, or part of them, and that instead of remitting the money, it went to pay for the notes herein involved. For the purpose of showing that the notes sent by Lewis to Westover & Williams had been collected by them, and that he had money in their hands to pay for the notes in controversy, several letters written by the firm to Mr. Lewis were put in evidence. These letters stated "charge our account with the following notes," naming them. It was certainly competent to prove, at least, so far as the sureties were concerned, that, as a matter of fact, the notes had not been collected. It was solely by the collection of the notes sent to Westover & Williams that the plaintiff claims to have paid money for the notes in controversy. If but a part of the old notes were collected and the money thus collected was remitted to Mr. Lewis, as the defendants insist, then it is perfectly clear the sureties are not liable. If, however, any portion of the money collected on the old notes was retained by the firm in payment of notes indorsed by them to Mr. Lewis, the sureties would be bound for their payment the same as if the money had been sent to Westover & Williams expressly for the purpose of paying for the notes. Even if the language used in the letters referred to should be construed to mean that the notes therein mentioned had been collected, that would not estop the sureties from proving that the notes in fact had not been paid. Suppose Westover & Williams had admitted that all the notes sent them by Mr. Lewis had been collected, when not a dollar had been paid thereon, certainly the sureties would be allowed to prove the admission was untrue. There can be no doubt of it. If Lewis or the plaintiff was prejudiced by the statements in these letters, the sureties cannot be

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holden therefor. By their undertaking they guaranteed to Mr. Lewis and his assigns the payment of all notes which their principals should sell to Mr. Lewis; further than that they did not promise. The testimony of W. H. Westover is to the effect that not to exceed \$1,500 was collected by his firm for Mr. Lewis during the time this bond was in force, and that every dollar of it was remitted to him. If this is true, of which the jury were the sole judges, Lewis paid no money for the notes in suit. As to the Dowers note, mentioned in the petition, the testimony conclusively shows that it was paid to Westover & Williams while it was in their hands for collection. Whether they remitted the money to Mr. Lewis is quite immaterial, as the sureties are not holden for moneys collected by Westover & Williams and not remitted. There is in the record also testimony from which the conclusion can be properly drawn that some of the notes involved in this litigation were but renewals of notes owned by Mr. Lewis when the bonds declared on was given, and, as already stated, the sureties are not liable for the payment of such renewals. Of the remaining notes there is testimony tending to show that they were received by Lewis from Westover & Williams in exchange for notes owned by Mr. Lewis which had been taken by the firm of Roberts, Westover & Williams. The manner of doing the business was this: Mr. Lewis sent at different times to Westover & Williams several of the old firm notes, and charged them therewith. Subsequently they sent to Mr. Lewis the notes in suit in place thereof, and he gave them credit for their face value less one-half per cent per month until their maturity. The jury found that Mr. Lewis paid no money for the notes received from Westover & Williams, and the evidence, though conflicting, sustains the verdict.

It is urged that the court erred in allowing W. H. Westover to testify that the bond was given to obtain money to loan for Lewis on chattel security. It was the theory of

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the defense that the bond was given in order to obtain money to loan for Mr. Lewis; that it was delivered on that condition and as a device to evade the usury laws, and that Mr. Lewis failed to comply with the condition by failing to furnish any money. It is in evidence that the bond sued on was sent by Mr. Lewis to Westover & Williams with a request that they execute and return the same. Before it was executed Westover & Williams wrote Mr. Lewis the following letter:

“DAVID CITY, NEB., Dec. 19, 1883.

“*Henry E. Lewis, Lincoln, Neb.*: Do you intend to furnish us additional money to loan on chattels? Presume you do, as you have sent us bond for \$10,000, our old one being for \$5,000. If you do not, we do not care to execute a new bond for more than the old one, to-wit, \$5,000; but if you wish to put some \$4,000 to \$5,000 more on chattels, of course we will execute the new bond. We have our bondsmen ready to sign. Saw them to-day. Please let us know by return mail so that we can either leave the bond at \$10,000 or change it to \$5,000.

“As soon as we hear from you we will execute bond and send in paper for November.

“Your friends, WESTOVER & WILLIAMS.”

No reply to it was received, and subsequently the bond was sent by mail inclosed in the following letter:

“DAVID CITY, NEB., Jan. 1, 1884.

“*Henry E. Lewis, Esq.*—DEAR SIR: Inclosed find bond and contract duly executed. As you will perceive we have filed the bond for \$10,000, and will expect at least \$10,000 more money from you to handle, provided we do the business in a safe and satisfactory manner, which we propose to do, and which we are now prepared to do. We can place all the money you can let us have as fast as you can get it ready for us, and hope you can get some in a very short time, as the demand is now good and we can get a good rate. Yours truly, WESTOVER & WILLIAMS.”

Counsel for plaintiff urges in his brief that it was immaterial what the object of Westover & Williams was in executing the bond, unless it is shown that Mr. Lewis in accepting it had the same object in view. That the purpose of Westover & Williams in delivering the bond was to secure money from Mr. Lewis to loan for him, is clearly stated in the two letters copied above, one written before the bond was executed, and the other transmitting it. Mr. Lewis was fully apprised by these letters of the object of Westover & Williams, and having accepted the bond with knowledge of such purpose, without objection, he took it subject to condition on which it was delivered. The testimony of the witness Westover objected to was competent as tending, in connection with other evidence, to prove the charge that the bond was taken as a cover to evade the usury laws. While most of the testimony offered by the defendants, on that branch of the case, was excluded from the jury by the trial court, there is some evidence in the record from which the inference could be drawn that the bond was taken as a device to enable Mr. Lewis to collect usury.

Complaint is made of other rulings of the court on the admission and rejection of testimony, which we do not consider of sufficient importance to be here reported. Suffice it to say, we have carefully examined and considered the same and find that the objections are without merit.

The remaining assignments of error relate to the giving of certain instructions, which we will now consider. The third instruction given at the request of the defendants is as follows:

"Before the plaintiff can recover against the bondsmen, Coon, Klosterman, and Hill, he must prove by a preponderance of the evidence that he either paid, or promised to pay, money for the notes involved in this suit. If they were paid for with anything else than money the bondsmen would not be liable."

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By this instruction it was doubtless intended to submit to the jury the question whether Mr. Lewis paid or promised to pay money for the notes, instead of whether the plaintiff paid for the notes with money. The notes were indorsed to the plaintiff, and the producing of them at the trial was sufficient evidence of his ownership had there been no further proof on that subject. It is established by undisputed proof that the plaintiff, Labaree, paid Mr. Lewis money for the notes, so that under the evidence the jury could not have found that they were paid for with anything else. How plaintiff became the owner of the notes was not important, but rather did Westover & Williams sell them to Mr. Lewis and receive money in payment? There was no necessity for giving the instruction complained of, but we are unable to see how its giving could have in any manner prejudiced the plaintiff. Had there been any evidence before the jury which tended in the least degree to prove that plaintiff did not pay money for the notes, then the charge would have been prejudicial to the rights of the plaintiff. A verdict will not be set aside for the giving of an instruction uncalled for by the evidence, if not prejudicial. (*O'Hara v. Wells*, 14 Neb., 403.)

Error is assigned in the giving of the following instruction asked by the defendant:

"4. The jury are instructed that to sell property is to transfer it from one to another in consideration of a price paid or agreed to be paid in current money. A sale differs from a barter in this, that in a barter the consideration, instead of being in money, is paid in goods or merchandise susceptible of a valuation. If the jury find from the evidence that the transfer to Lewis by Westover & Williams of the notes in controversy was not made for money, then the same was not a sale under the meaning of that word in the bond, and if the transfer of said notes to Lewis was made for a consideration other than money,

that would be a barter for which the bondsmen of Westover & Williams would not be liable under their bond."

The court drew the proper distinction between barter and sale. If the notes were paid for in money it was a purchase and sale. If the consideration for the transfer of the notes to Lewis was other notes, then the transaction was an exchange or barter. (1 Benjamin on Sales, sec. 2; *Vail v. Strong*, 10 Vt., 459; *Elwell v. Chamberlin*, 31 N. Y., 624; *Long v. Fuller*, 21 Wis., 123; *Edwards v. Cottrell*, 43 Ia., 194.)

It is claimed by counsel for plaintiff that the instruction required that in each instance Lewis must have sent the money, or the transaction would not be covered by the bond. In this counsel are in error. If money belonging to Lewis was in the hands of Westover & Williams, arising from the collection of notes he had previously sent them, at the time the notes in suit were transferred to Lewis, and the money was applied in payment of the notes so transferred, then it was a sale. It would be a cash transaction. This was made plain to the jury by the second instruction given at the request of the plaintiff. It stated that "If you find that H. E. Lewis, from the proceeds of other notes collected by Westover & Williams, authorized payments to be made for notes purchased of Westover & Williams, and that said Westover & Williams had sufficient, in amount of such proceeds, to make such payments when transfers of such notes were made to Lewis, if you find they were made, you are instructed that such payments would, equally with actual remittances of money under the same circumstances, amount to payment for such notes."

It is obvious that the charge of the court fully and fairly submitted to the jury the plaintiff's theory of the case. It is a mistake to say that the jury was restricted to actual cash transaction. No such inference can be drawn from the instructions.

Objection is made to the defendant's sixth instruction, which reads:

"6. If you find from the evidence, that Westover & Williams, in the transaction involved in this suit, in taking the notes introduced in evidence, and sending the same to the said Henry E. Lewis, were acting as the agents of the said Lewis, and that the contract and bond introduced in evidence, and the alleged sale of notes involved in this suit, was simply a device to evade the usury laws, then you are instructed that such transaction would not amount to a sale of the notes within the meaning of the bond sued on. But if you so find, you will find for the defendants Coon, Klosterman, and Hill."

Counsel for plaintiff contends that the instruction was inapplicable to the evidence introduced; in other words, that there is no proof that the relation of principal and agent existed between Mr. Lewis and Westover & Williams, or that the bond was given as a device to avoid the usury laws. There was sufficient evidence from which the jury might infer agency. The testimony of Mr. Lewis shows that Westover & Williams were his agents in the collection of the old Roberts, Westover & Williams notes. There is evidence tending to prove that part of the notes involved in this controversy were taken by Westover & Williams in renewal of the notes sent to them by Mr. Lewis for collection. In the taking of these renewals and sending them to Mr. Lewis, they were his agents. In addition to the two letters written by Westover & Williams, copies of which are given in this opinion, there is in the record a letter written by Mr. Lewis to Westover & Williams, under date of September 19, 1884, which contains this language: "Why do you not send that paper that your Mr. Williams said in the note left on my door last week, you had ready, and would send me the last of last week? There is a large amount of paper due me from you and I want it sent in. I wish to make no new

loans in your county, but wish all collections hereafter remitted to me in cash. I shall probably have an agent go to your county in the course of a few days who will take charge of all collections there, and all notes then uncollected you can turn over to him for collection. Until then do not make any collections of notes not yet due, except in cash, which remit to me as collected."

On August 26, 1884, Mr. Lewis sends Westover & Williams several notes for collection, and in the letter transmitting them, among other things, states, "before sending any more I must have a report and notes for the notes so long overdue."

W. H. Westover testified in answer to questions as follows:

Q. When these notes were sent to you what, if any of them, were renewed during that time?

A. Nearly all of them.

Q. State what, if any, knowledge Mr. Lewis had as to what was being done with his notes, as they matured, by you and Mr. Williams.

A. He knew all about it; he knew just exactly what we were doing with those notes.

Q. In what respect?

A. He knew that we were renewing the most of them, and but very little money was being collected.

Q. What, if any, objection did he make to that?

A. He never made any; that was a part of our arrangement to keep the money out.

Q. What do you mean by arrangement?

A. Our understanding was, that was what we gave him the bond for and made the contract with him for, we were making our money out of the interest we got, and so was he.

There was ample evidence to submit to the jury the question of agency. The proofs show that Mr. Lewis was to receive eighteen per cent per annum. From this fact,

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to grant the same. The application must be signed by some person empowered by the corporation so to do, but it need not be dated nor verified, nor is it essential to jurisdiction that it should aver the act of incorporation of the railroad company.

6. ———: APPRAISEMENT: NOTICE. Before a railroad company can have the damages of a resident land-owner appraised, ten days' notice in writing must be given the owner or guardian, either by personal service, or by leaving a copy thereof at his usual place of residence, unless waived.
7. ———: AWARD: APPEAL. Where a land-owner takes an appeal from the award of commissioners, appointed to assess damages for right of way, he waives all objection as to notice and that the appraisers were not properly sworn.
8. ———: ———: ———. On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings.
9. A judgment will not be reversed for errors committed on the trial which do not affect the substantial rights of the party complaining.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Lamb, Ricketts & Wilson, for plaintiff in error:

Objections to the jurisdiction of a sheriff's jury are not waived by an appeal from their award. (*Schroeder v. R. Co.*, 44 Mich., 387; *Slough v. R. Co.*, 33 N. W. Rep. [Ia.], 149; *Kanne v. R. Co.*, 23 N. W. Rep. [Minn.], 854.) As to the authority of the company to exercise the right of eminent domain over the premises: *Thomas v. R. Co.*, 101 U. S., 71; *Nichols v. Bridgeport*, 23 Conn., 189; *Judson v. Bridgeport*, 25 Id., 428; *People v. Brighton*, 20 Mich., 57; *Gillinwater v. R. Co.*, 13 Ill., 1; *Stanford v. Worn*, 27 Cal., 171; *Hull v. R. Co.*, 21 Neb., 385; *Doughty v. R. Co.*, 1 Zab. [N. J.], 442; *N. Y. & H. R. Co. v. Kip*, 46 N. Y., 546; *Shields v. Ohio*, 95 U. S., 319; *St. L. R. Co. v. Berry*, 113 U. S., 465; *McMahan v. Morrison*, 16 Ind., 172. The power granted by the state to

take property by eminent domain cannot be delegated. (*Coe v. R. Co.*, 10 O. St., 372; *Atkinson v. R. Co.*, 15 Id., 36; *Shields v. Ohio*, 95 U. S., 323, 324.) Our statute requires condemnation proceedings to be conducted by the directors of the local corporations. (*Morawetz, Corp.*, sec. 948; *St. L. R. Co. v. Berry*, 113 U. S., 465; *Powers v. R. Co.*, 33 O. St., 432; *A. & N. L. R. Co. v. Smith*, 15 Id., 328; *Atl. R. Co. v. Sullivant*, 5 Id., 276; *Lyon v. Jerome*, 26 Wend. [N. Y.], 485; *U. P. R. Co. v. B. & M. R. Co.*, 19 Neb., 389.) Neither the original nor the consolidated company ever filed its corporate articles in the county clerk's office in any county in Nebraska. (*White v. Blum*, 4 Neb., 560; *Abbott v. Smelting Works*, 4 Id., 416; *Ind. Furnace Co. v. Herkimer*, 46 Ind., 142; *Morris & E. R. Co. v. R. Co.*, 31 N. J. L., 205; *Belt & H. T. Co. v. R. Co.*, 35 Md., 231.) It is indispensable that the record of condemnation proceeding should contain the notice. (*Hull v. R. Co.*, 21 Neb., 384-5; *Lewis, Em. Domain*, secs. 374, 369, and cases; *County of Ramsey v. Stees*, 28 Minn., 326; *Ells v. R. Co.*, 48 Mo., 231.) The application was fatally defective. (*Matter of Brooklyn R. Co.*, 72 N. Y., 249; *Holbert v. R. Co.*, 45 Ia., 23; *M., C. & L. R. Co. v. Clark*, 23 Mich., 519, and cases; *Bowers v. R. Co.*, 33 O. St., 429; *Reitenbaugh v. R. Co.*, 21 Pa. St., 100; *Lewis, Em. Domain*, secs. 351, 352; *Anderson v. St. Louis*, 47 Mo., 479.) The defendant estopped to claim that it is a Nebraska corporation. (*State, ex rel. Breaux, v. Judges*, 34 La. Ann., 1220; *Bank v. St. John*, 25 Ala., 566; *Ex parte Smith*, 94 U. S., 456.)

A. R. Talbot, and *B. P. Waggener*, *contra*, cited, as to the application: *Mead v. Haynes*, 3 Rand. [Va.], 33; *Whitworth v. Puckett*, 2 Gratt. [Va.], 531; *Lewis, Em. Domain*, sec. 342; *Soule v. Cosner*, 56 Ind., 276; *Palmer v. High Comr's*, 49 Mich., 45; *Ward v. R. Co.*, 119 Ill., 287; *Smith v. R. Co.*, 105 Id., 511; *Bachelor v. New Hampton*,

60 N. H., 207; *Hardy v. Keene*, 54 Id., 449; *Steele's Petition*, 44 Id., 220; *Jansen v. Grimshaw*, 125 Ill., 468; *Schwass v. Hershey*, Id., 664; *Henry v. R. Co.*, 121 Id., 264; *State v. Richmond*, 26 Id., 232; *Hustin v. Clark*, 112 Ill., 350; *A. T. & S. F. R. Co. v. Patch*, 28 Kan., 470; *Haus v. Lees*, 18 Id., 449; *Ogden v. Stokes*, 25 Id., 518; *Stephens v. Com'rs*, 36 Id., 664; *Tingley v. Providence*, 9 R. I., 388-390; *Omaha Belt Ry. Co. v. McDermott*, 25 Neb., 716. As to the notice: *Hull v. R. Co.*, 21 Neb., 384-5; *Bd. of Supervisors v. Magoon*, 109 Ill., 143; *Wood v. Wilson*, 12 Ind., 659; *Akin v. Bd. Com'rs*, 36 Kan., 170; *Com'rs v. Heed*, 33 Id., 34; *Sowle v. Cosner*, 56 Ind., 276; *R. Co. v. Benham*, 28 Mich., 459; *McCaslin v. Camp*, 26 Id., 390; *Peavey v. Wolfborough*, 37 N. H., 287-293; *Foss v. Strafford*, 25 Id., 78; *Goodwin v. Milton*, 25 Id., 458; *R. Co. v. Folsom*, 46 Id., 64; *Roberts v. Stark*, 47 Id., 223; *Gt. Falls Mfg. Co. v. Att'y Gen'l*, 124 U. S., 581; *Collman v. Fleming*, 82 Ind., 118-25; *R. Co. v. Allen*, 100 Id., 409. As to the fact of incorporation: *Reisner v. Strong*, 24 Kan., 410; *McAuley v. R. Co.*, 83 Ill., 348; *R. Co. v. R. Co.*, 105 Ill., 110; *Angell & Ames, Corp.*, sec. 94; *Bank of Toledo v. Internatl. Bank*, 21 N. Y., 542; *Williamson v. Ass'n*, 89 Ind., 339; *Baker v. Neff*, 73 Id., 68; *R. Co. v. R. Co.*, 32 N. J. Eq., 755; *Elevated R. Co.*, 70 N. Y., 327-8; *State v. R. Co.*, 25 Neb., 164, 165. As to the effects of the appeal: *M. & M. R. Co. v. Rosseau*, 8 Ia., 373; *R. Co. v. Hayes*, 13 Neb., 489; *R. Co. v. Umstead*, 17 Id., 460; *Gerrard v. R. Co.*, 14 Id., 271; *Clarke v. R. Co.*, 23 Neb., 615; *Maxwell, Pl. & Pr.*, 108; *Sch. Dist. v. Caldwell*, 16 Neb., 68; *Durbin v. Fisk*, 16 O. St., 534; *Harper v. Miller*, 4 Ired. L. [N. Car.], 34. As to the effect of the consolidation: *State v. R. Co.*, 25 Neb., 156, 164; *R. Co. v. Auditor Gen'l*, 53 Mich., 79; *R. Co. v. Ga.*, 92 U. S., 665-7; *Green Co. v. Conness*, 109 Id., 104; *R. Co. v. Adams Co.*, 88 Ill., 615; *Horne v. R. Co.*, 12 Am. & Eng. R. Cases, 488; 20 Id., 590; *Muller v.*

Dows, 94 U. S., 444, 447; *T. & P. R. Co. v. McAllister*, 59 Tex., 349; *Peik v. R. Co.*, Id., 164; *O. & M. R. Co. v. Wheeler*, 1 Black [U. S.], 286; *R. Co. v. Whitton*, 13 Wall. [U. S.], 283; *County v. R. Co.*, 51 Pa. St., 228; *Angier v. R. Co.*, 74 Ga., 634; *Sage v. R. Co.*, 70 N. Y., 220; *Williamson v. R. Co.*, 26 N. J. Eq., 398; *Graham v. R. Co.*, 118 U. S., 169; *R. Co. v. Dunn*, 122 Id., 513; *McClure v. Campbell*, 25 Neb., 58; *Des Moines Nav. Co. v. Ia. Homestead*, 123 U. S., 557; *McCormick v. Sullivant*, 10 Wheat. [U. S.], 192; *Plumb v. Goodnow*, 123 U. S., 560; *Boone Co. v. Patterson*, 98 Id., 403; *Hartog v. Memory*, 116 Id., 588-692.

NORVAL, J.

The Missouri Pacific Railway Company on the 17th day of October, 1885, filed in the county court of Lancaster county its petition praying for the condemnation, for right of way purposes, of a strip 100 feet in width across the north half of the southeast quarter of the northeast quarter of section 24, town 10, range 6 east. The county judge appointed six disinterested freeholders, residents of said county, to assess and report the damages sustained by Milton L. Trester, the owner of said real estate, by reason of the location of the railroad. The damages assessed and reported by the commissioners amounted to \$2,500. An appeal was taken by the land-owner to the district court, where the railway company filed a petition for removal of the cause to the circuit court of the United States for the district of Nebraska, on the ground that it was a citizen of the state of Missouri, and the owner of the land was a citizen and resident of this state. The district court approved the bond, which accompanied the application, and made an order removing the cause to the federal court. Subsequently Trester filed in the court below a motion to vacate the order of removal, and to redocket the case for trial. The motion being denied, Trester prose-

cuted a petition in error to this court, and at the January term, 1888, the order of the district court was reversed, and the cause remanded, with directions to reinstate the cause, and dismiss the proceedings for want of jurisdiction. (See 23 Neb., 242.)

A motion for a rehearing was made by the railroad company, on consideration whereof it was adjudged by the court that the former judgment of this court be vacated and set aside, and the decision of the district court was reversed, and the cause remanded for further proceedings. In obedience to the mandate of this court, the case was tried, and a verdict was returned in favor of the plaintiff in error for \$3,100.

On the motion for a rehearing, no opinion was filed. The legal effects of the decision, however, was to overrule the former opinion in so far as it held that the condemnation proceedings were void, and that neither the county judge nor the district court had jurisdiction to take any action in the matter. In the opinion filed it was rightly ruled that, under the provisions of our constitution, a railroad company not incorporated under the laws of this state cannot exercise the right of eminent domain. If, therefore, the defendant was not a domestic corporation when it filed its petition in the county court, it acquired no right to the plaintiff's property by the condemnation proceedings, and the plaintiff could not recover compensation for the property attempted to be taken for right of way purposes, and the entire proceedings would be a nullity. The opinion filed, in declaring the condemnation proceedings void, was based upon the assumption that the defendant was not a domestic corporation. In other words, that the petition for removal conclusively established that the defendant was a foreign corporation. From the fact that the defendant alleged, in its petition for removal of the cause from the state court to the circuit court of the United States, that the defendant was a citizen and resident of an-

other state, it could not be conclusively presumed that it was a foreign corporation no more than the allegation in the motion of the plaintiff to vacate the order of removal, that "the defendant railway company is not a non-resident corporation, but is a company formed by the consolidation of a Missouri corporation, a Kansas corporation, and a Nebraska corporation" estopped the plaintiff from subsequently denying that the defendant is a domestic corporation. Whether a railroad company, which has sought to acquire private property for right of way purposes by condemnation proceedings, instituted under the statutes, is a foreign or domestic corporation is to be determined in the same manner as any other question of fact.

One of the issues presented and tried in the lower court, after the reversal of the cause, was whether the defendant was a Nebraska corporation. Upon that question the parties changed positions, the plaintiff in error in his petition alleging that the defendant company is a non-resident corporation, which averment is denied by the answer. The proofs show that the certificate of organization of the Missouri Pacific Railway Company of Nebraska, and the articles of incorporation of said company were filed and recorded in the office of the county clerk of Douglas county, and subsequently in the year 1882 certified copies thereof were filed for record in the office of the secretary of state of Nebraska, whereby the Missouri Pacific Railway Company of Nebraska became a body corporate, pursuant to and in accordance with the laws of this state.

On the 14th day of February, 1882, the Missouri Pacific Railway Company of Nebraska and the Missouri Pacific Railway Company, a corporation formed by consolidation of other companies, pursuant to the laws of Missouri and Kansas, entered into articles of consolidation, whereby the two companies were consolidated under the corporate name of the Missouri Pacific Railway Company. These articles of consolidation were ratified and

approved by the stockholders of the respective companies, who owned and represented two-thirds of all the capital stock. The articles of consolidation, together with the written ratification and approval thereof by the stockholders, were filed for record in the office of the secretary of state on the 3d day of March, 1882. It is unnecessary to state the terms of consolidation, nor discuss the sufficiency of the consolidation proceedings, for the reason that the same were before this court and fully considered in the case of the *State v. M. P. Ry. Co.*, 25 Neb., 164. It was there held that, by virtue of such consolidation, the defendant became a domestic corporation. With that conclusion we are content. By the act of consolidation the two companies were merged into the new corporation thus formed, and all the powers, rights, and franchises of the original corporations were transferred to the new company. That the corporate name adopted for the new company is the same as that of one of the consolidating companies, which was organized under the laws of another state, did not make the new corporation a foreign corporation. The consolidated company has a separate and distinct corporate existence in each of the states through which the road is located, and while it has but one board of directors, so much of the road and property of the company as is in this state is governed and controlled by the laws of the state. It has the same power to acquire real estate in this state, by the right of eminent domain, as if it had been originally incorporated in this state.

In *State v. C., B. & Q. R. Co.*, 25 Neb., 156, Chief Justice REESE, referring to section 114, chapter 16, Compiled Statutes, in the opinion observed that this section, in effect, provides that where a domestic corporation—that is, one organized under the laws of this state, and having its existence solely within this state—becomes consolidated with a corporation originally erected in another state, the new corporation is entitled to exercise the same rights

and is subject to the same restrictions and liabilities as the original corporation in this state before the consolidation. These rights and privileges consist in the exercise of the right of eminent domain, of acquiring property by purchase, for the use of the corporation, and of enjoying such other rights and privileges as properly belong to corporations.

Counsel for plaintiff in their brief contend that neither the original nor the consolidated corporation ever filed its corporate articles in the county clerk's office in any county in this state. Counsel are in error so far as the recording of the articles of incorporation of the Missouri Pacific Railway Company in Nebraska is concerned. The corporate articles of said company, as disclosed by the record, were recorded in the county clerk's office of Douglas county on the 8th day of June, 1881. It does not appear that the articles of consolidation were ever recorded in any county, nor, if we read the law correctly, was there any necessity therefor. Section 91 of chapter 16, Compiled Statutes, provides, in effect, that upon the making of the articles of consolidation, in the manner pointed out in the statute, and filing a duplicate thereof with the secretary of state, the consolidating corporations shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned. There is no provision of statute which requires articles of consolidation of two or more corporations to be recorded in the county clerk's office.

It is also urged that neither the original nor the consolidated company have corporate power to exercise the right of eminent domain in Lancaster county, for the reason that said county is not named in the certificate of organization of the original company, as one of the counties through which the road was to be constructed. The route and termini of said railway is described in the certificate of organization thus: "The termini of said railway shall be the city of Omaha, in the county of Douglas, and state of

Nebraska, and a point on the southern boundary line of the county of Richardson, in the state of Nebraska, to be hereafter selected. Said railway shall pass through the counties of Douglas, Sarpy, Cass, Otoe, Nemaha, and Richardson, and, if actual survey shall render such a location necessary, Johnson and Pawnee."

The second subdivision of section 73 of chapter 16, Compiled Statutes, requires that the certificate of organization of a railroad corporation shall state the names of the termini of the road and the county or counties through which the road shall pass. It is not claimed that the defendant's main line of road was not constructed between the termini named in the certificate or on the route therein specified. The certificate of organization makes no mention of the branch line from Weeping Water to Lincoln, nor any other branch line. The question is, therefore, squarely presented, whether the certificate of organization must definitely fix and name the places of termini of branch lines, and the counties through which they will pass. The authority conferred by the legislature for the construction of branch lines, is found in section 75 of said chapter 16, which reads as follows:

"Sec. 75. Such corporation shall be authorized and empowered to lay out, locate, construct, furnish, maintain, operate, and enjoy a railroad with single or double tracks, with such side tracks, turn-outs, offices, and depots as shall be necessary between the places of the termini of the said road, commencing at or within and extending to or into any town, city, or village named as the termini of said road, and construct branches from the main line to other towns or places within the limits of this state."

Construing the provisions of sections 73 and 75 together there is no room for doubt that it was the intention of the legislature to require only that the places of termini of the main line of railroad and the counties through which it would pass should be definitely specified in the certificate

of organization, and authority is conferred upon such corporation to construct branches from the main line, although the termini and location of such branch line are not stated in its original certificate of incorporation. If a railroad company is powerless to construct branches from its main line, unless the termini of such branch lines and the counties through which they should pass are named in the certificate of organization, then the latter clause of section 75 is meaningless.

The case of *Attorney General v. West Wisconsin Ry. Co.*, 36 Wis., 466, cited in the brief of plaintiff in error, is not an authority on the question under consideration. In the precedent cited the charter of the railroad company specified the places of termini of the road. Subsequently the company abandoned one terminal point mentioned in the charter, and in an action by the attorney general to forfeit the charter, it was held that the corporation had no power to change the places between which the road was to run. The right to construct branch lines, without the places of termini being named in the charter, was not involved or passed upon in the case. The other authorities cited by plaintiff in error are to the same effect, and will not be further noticed.

We are of the opinion that the Missouri Pacific Railway Company of Nebraska, before the act of consolidation, possessed the power to condemn the plaintiff's land for right of way purposes, and all the rights, powers, privileges, and franchise of the original company being merged in the consolidated company, the latter company was authorized to construct a branch from its main line into Lancaster county and exercise the right of eminent domain over the lands in question.

It is claimed that the petition filed by the railroad company for the appointment of commissioners to assess the damages, is so defective as not to give the county judge jurisdiction. The petition is as follows:

Trestler v. M. P. R. Co.

"In the County Court, Lancaster County, Nebraska.

"In the Matter of the Right of
Way and Depot Grounds of
the Missouri Pacific Railway
Company. } Request for Commission-
ers to Appraise Dam-
ages.

"To Charles M. Parker, County Judge:

"The Missouri Pacific Railway Company shows to your honor, that it has located its line over and through the grounds hereinafter described, and has located its switch yards and depots on the grounds hereinafter set forth and described, and that the appropriation of said lands to such uses is necessary to the construction and operation of said railway, and that said company has endeavored to obtain the consent of the several owners and agree with them on such damages so occasioned to them by such appropriation, but has been unable to make any personal agreement, and petitioner has given to non-resident owners notice by publication, as required by law herewith filed, and has given personal notices to resident owners, to-wit: N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ section 24, Tp. 10, R. 6 E., 100 feet wide and through the same, M. L. Trestler, owner, and said railway company prays appraisement of damages by commissioners, which owners shall sustain by reason of the appropriation of such lands to the uses of the Missouri Pacific Railway Company.

"THE MO. PAC. RY. CO.,

"By JOSEPH R. WEBSTER, AND

"W. E. STEWART,

"Att'ys for this Proceeding."

It is objected, in the brief of counsel, that the petition is insufficient for the reasons that it is not dated, sworn to, nor signed by any officer of the company; because it does not state in what place, manner, or course the defendant located its line of road over plaintiff's premises, or the date of such location, and the petition fails to allege that the defendant is a corporation organized under the laws of this state.

Authority for the appraisement of damages sustained by the land-owner, by reason of the location of a railroad over his premises, is found in section 97 of chapter 16 of the Compiled Statutes. It provides that "if the owner of any real estate over which said railroad corporation may desire to locate their road shall refuse to grant the right of way through his or her premises, the county judge of the county in which said real estate may be situated, as provided in this subdivision, shall, upon the application of either party, direct the sheriff of said county to summon six disinterested freeholders of said county, to be selected by said county judge, and not interested in a like question, unless a smaller number shall be agreed upon by said parties, whose duty it shall be to carefully inspect and view said real estate and assess the damages, which said owner shall sustain by the appropriation of his or her land to the use of said railroad corporation, and make report in writing to the county judge of said county, who, after certifying the same under his seal of office, shall transmit the same to the county clerk of said county for record, and said county clerk shall file, record, and index the same in the same manner as is provided for the record of deeds in this state, * * * in pursuance of the statute in such case made and provided. And if said corporation shall at any time, before they enter upon said real estate, for the purpose of constructing said road, pay to said county judge for the use of said owner the sum so assessed and returned to him as aforesaid, they shall thereby be authorized to construct and maintain their said road over and across said premises; *Provided*, That either party may have the right to appeal from such assessment of damages to the district court of the county in which such lands are situated, within sixty days after such assessment," etc.

It is contended by the defendant that there is no provision of the law which requires that the application for the appointment of appraisers to assess the damages of the

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land-owner, shall be in writing. The statute above quoted authorizes the county judge to make the appointment upon the application of either party. While the law does not in express terms state that a written application must be filed, yet it is manifest that the meaning of the law is, that a written petition must be presented to the county judge. The very important nature of the proceeding suggests the impropriety of a verbal application. The petition for the appointment of freeholders to assess the damages should state the name of the railroad corporation seeking to appropriate the real estate, the name of the land-owner, if known, a description of the land over which the railroad is located, the width required for right of way purposes, and that the land-owner refuses to grant the right of way through his premises. There is no law which requires that the petition should be either dated or sworn to, or that it should state the exact location of the line of road through lands sought to be condemned, or the date of the location of such road. In the absence of a statutory provision designating the officer of the corporation who shall sign the petition, it may be signed by any officer thereof empowered by the corporation so to do, or by an authorized attorney. There being no proof to the contrary it will be presumed that the application, in the case at bar, was signed by persons duly empowered to so represent the defendant. While under the constitution and laws of this state a foreign corporation cannot acquire property by eminent domain, it is not necessary to jurisdiction that the application for the appointment of commissioners to appraise the damages of the land-owner should aver that the railway company was organized under the laws of this state. If it is necessary that the application should contain such allegation, when filed by the railroad company, it would likewise be important when the application is made by the land-owner. A corporation may sue and be sued by its corporate name without an averment of the act of incorporation. (*Exchange Natl.*

Bank v. Capps, 32 Neb., 242.) The cases relied on by the plaintiff in error to sustain the doctrine that the defendant was compelled to allege its incorporation under the laws of Nebraska, are from states containing statutory provisions unlike those of Nebraska, and the decisions referred to are not to be followed as precedents here. The petition presented to the county judge in every respect complied with the statute relative to the appropriation of real estate for right of way purposes.

It is also urged that there is no proof of any notice of the condemnation proceedings having been given to Trestler. Counsel for defendant insist that the statute does not require that notice be given, except to a non-resident landowner. In this counsel are mistaken. Section 100 of chapter 16 of the Compiled Statutes provides for notice by publication to non-resident owners of land, and section 98 of the same chapter prescribes that the railroad company may have the damages assessed by the commissioner, by giving the owner or guardian ten days' notice in writing, either by personal service, or by leaving a copy thereof at his usual place of residence. The statute contemplates that notice shall be given of condemnation proceedings, and the giving of notice is an essential prerequisite to be complied with by the railroad company before the property of an individual may be appropriated by the corporation, unless waived.

It will be observed that the application filed with the county judge for the appointment of appraisers alleges that personal notice was given to Trestler. The plaintiff in error did not, in his petition filed in the district court, tender any issue upon the question of want of notice. The objection, therefore, cannot be considered. (*R. V. R. Co. v. Hayes*, 13 Neb., 489; *Gerrard v. R. Co.*, 14 Id., 271.)

Again, the plaintiff in error by taking an appeal to the district court from the award of the commissioners, en-

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tered his appearance and waived all objection as to notice. (*O'Dea v. State*, 16 Neb., 241; *R. Co. v. Patch*, 28 Kan., 470; *Aiken v. Commissioners*, 36 Id., 170; *R. Co. v. Benham*, 28 Mich., 459; *R. Co. v. Allen*, 100 Ind., 409.)

The objection that the appraisers were not properly sworn must be overruled. The plaintiff not only waived the objection by taking an appeal, but no such issue was raised by the pleadings in the court below. The only question passed upon by the appraisers was the amount of damages sustained by the plaintiff. On appeal that question was tried *de novo*, and it was then wholly immaterial whether the appraisers were sworn or not.

After the order of removal of the case to the United States circuit court was made, the cause was tried in the federal court before a jury, a verdict was rendered in favor of Trestler for \$3,678.81, and judgment was entered thereon. The defendant company pleaded in the state court this judgment in bar. A transcript of the proceedings had in the United States court was introduced in evidence on the trial of the case in the lower court, over the plaintiff's objection and exception. It is claimed that this ruling was erroneous, and prejudicial to the rights of the plaintiff in error. Conceding, for argument's sake, that the entire proceedings in the United States court are a nullity, and that the exemplified copy of the record should not have been received in evidence, we do not see that the plaintiff has any just ground for complaint on account of the transcript of the proceedings being admitted in evidence. The only purpose of its introduction was to establish a bar to the plaintiff's proceedings in the state court. The jury did not give such effect to the judgment of the federal court, but entirely disregarded the same and returned a verdict for the plaintiff. Had a verdict been returned for the defendant the plaintiff would then have been in a position to challenge the ruling of the trial court. But with a verdict in plaintiff's favor, it is obvious that

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he was not in any manner prejudiced by the decision of the court here complained of, and it is firmly settled that this court will not reverse a judgment for errors committed which do not affect the substantial rights of the party complaining. This has been too frequently decided by this court to require the citation of authorities.

The plaintiff is in no better position if we regard the proceedings had in the federal court as valid and binding upon the parties, until reversed, vacated, or set aside. If the circuit court had jurisdiction, both parties are concluded by the judgment, and it was a complete bar, when pleaded and proved, to the proceedings in the state court. But the plaintiff cannot complain of the recovery of a judgment in his favor, when, if the judgment of the federal court was a bar, the verdict should have been for the defendant. The defendant company does not ask for a reversal of the judgment, and no complaint is made by the plaintiff as to the amount of the verdict. No reversible error has been pointed out in the record, and the judgment is

AFFIRMED.

THE other judges concur.

GEORGE W. LININGER ET AL. V. JOHN P. GLENN
ET AL.

[FILED OCTOBER 14, 1891.]

Executions: INJUNCTION DENIED. A petition in equity alleged that the plaintiffs therein commenced an action against J. P. G., constable, to recover possession of specific chattel property before a justice of the peace; that thereafter, by stipulation between the parties to said action, the same was continued "until the case of *G. W. L. et al. v. N. H., Sheriff*, then pending in the district court, should be finally determined, and it was

38	187
42	904
48	778
38	187
53	55

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further stipulated that the said justice of the peace should then render judgment in said cause in accordance with the judgment of the district court in said cause of *G. W. L. et al. v. N. H.*; that thereafter the said justice of the peace, unlawfully and without jurisdiction, or any notice to plaintiffs, rendered a judgment in said cause in favor of defendant therein, J. P. G., and against the plaintiffs for a return of said property or for the value thereof, assessed at \$164.25, and costs \$12.15; that the said cause of *G. W. L. et al. v. N. H.* was tried in the district court, with judgment for the defendant, but which judgment was afterwards reversed upon error in the supreme court; that a transcript of said judgment rendered by the justice of the peace was filed in the district court of G. county and entered upon the records of said court, and execution was issued thereon directed to the defendant W. C., sheriff of D. county; that said sheriff then had said execution and threatened to levy on the property of the plaintiffs to satisfy the same, with prayer for injunction, etc. On error for the sustaining of a demurrer to the petition, *held*, that the petition does not state facts sufficient to constitute a cause of action.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Hazlett & Bates, for plaintiffs in error, cited: *Sioux City & P. R. Co. v. Washington Co.*, 3 Neb., 41; *Robinson v. Mathwick*, 5 Id., 255; *Williams v. Holmes*, 2 Wis., 144; *Doody v. Vaughn*, 7 Neb., 31; *Nichol v. Patterson*, 4 O., 200; *Harper v. Albee*, 10 Ia., 389; *Fox v. Meacham*, 6 Neb., 531.

Burke & Prout, *contra*, cited: *Williams v. Lowe*, 4 Neb., 396; *Holmes v. Irwin*, 17 Id., 99; *Gould v. Loughran*, 19 Id., 392; *Horn v. Queen*, 4 Id., 108; *Hendrickson v. Hinckley*, 17 How. [U. S.], 443.

COBB, CH. J.

I adopt the statement of the case from the brief of counsel for plaintiffs in error.

This was an action brought in the district court of Gage county, by plaintiffs against defendants, to enjoin the collec-

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tion of a judgment rendered by H. G. Mechling, a justice of the peace of Gage county, in favor of the defendant John P. Glenn, and against plaintiffs, and to enjoin the levy of an execution issued on said judgment in the hands of the defendant Coburn, sheriff of Douglas county.

The petition and supplemental petition allege that on the 20th day of February, A. D. 1883, the plaintiffs commenced an action against the defendant John P. Glenn, constable, to recover possession of certain specific personal property, before H. G. Mechling, a justice of the peace; that thereafter it was stipulated by the parties to said action of plaintiffs v. Glenn that said cause should be continued by said justice until the case of George W. Lininger and Elizabeth Lininger v. N. Herron, sheriff of Gage county, Nebraska, then pending in the district court of said county, should be finally determined, and that said defendant H. G. Mechling, justice of the peace, render judgment in said cause in accordance with the judgment in the district court in said cause of plaintiffs v. N. Herron, sheriff; and thereupon said cause was continued upon said stipulation; that thereafter, on the 17th day of December, 1886, the defendant H. G. Mechling, justice of the peace, unlawfully and without jurisdiction, and without any notice to plaintiffs, rendered a pretended judgment in said cause in favor of the defendant John P. Glenn, constable, and against the plaintiffs George W. and Elizabeth Lininger, for the return of said property or for the value thereof, assessed at \$164.25, and costs \$12.15.

That the said cause of George W. Lininger and Elizabeth Lininger v. N. Herron, mentioned in said stipulation, was a case brought in the district court in replevin; that upon the trial of said action in the district court a verdict and judgment were rendered in favor of the defendant sheriff; that plaintiffs prosecuted a writ of error to the supreme court, and on November 25, 1885, the supreme court reversed said judgment of the district court and

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remanded said cause to said court for further proceedings; that upon the second trial of said cause, said district court again found the issues in said case in favor of the defendant; that thereafter said cause of G. W. and Elizabeth Lininger was again taken to the supreme court on error by plaintiffs, and the judgment of said district court again reversed and said cause remanded to said court for further proceedings, in which said district court said cause is still pending and undetermined.

That on or about the 12th day of August, A. D. 1887, a transcript of said pretended judgment rendered by said justice of the peace in the case of George W. and Elizabeth Lininger v. John P. Glenn was filed in the district court of Gage county and entered on the records of said court, and on August 15, 1887, an execution directed to the defendant Wm. Coburn, sheriff of Douglas county, Nebraska, was issued on the same; that said sheriff now has said execution and threatens to levy on the property of these plaintiffs to satisfy the same, etc.

That said defendant H. G. Mechling, justice of the peace, had no authority or jurisdiction to render a judgment in said cause of G. W. and Elizabeth Lininger v. John P. Glenn, and that said pretended judgment rendered by him is absolutely void and of no force and effect.

Prayer for temporary injunction restraining issue and levy of execution on said pretended judgment, and on final hearing that the injunction be made perpetual and that said pretended judgment may be declared null and void and of no force and effect, etc.

A transcript of the proceedings of the justice in the case of *Lininger v. Glenn* was attached to the petition as an exhibit.

On September 26, 1887, the court granted a temporary restraining order under their petition as prayed.

On October 27, 1887, the defendant Coburn, sheriff, filed a separate demurrer to this petition on the following grounds:

First—That the court had no jurisdiction to issue an order of injunction against this defendant in his official capacity as sheriff of Douglas county.

Second—That the court has no jurisdiction over the person of the defendant.

Third—That the court has no jurisdiction over the subject-matter of the action.

Fourth—That the petition fails to state a cause of action.

The court overruled the demurrer as to the first, second, and third grounds, and sustained the same as to the fourth ground.

The defendants Mechling and Saunders filed a demurrer to the petition on the following grounds:

First—That the court has no jurisdiction of the subject-matter of the action.

Second—That the petition does not state facts sufficient to constitute a cause of action.

Third—That said petition does not state facts sufficient upon which to issue an order of injunction.

The court sustained this demurrer. To which rulings sustaining said demurrers the plaintiffs excepted.

The plaintiffs not desiring to plead further, the court entered judgment dismissing said action at plaintiffs' costs, and to reverse which rulings and judgment the plaintiffs bring the cause to this court by petition in error.

The sole ground for injunction or relief set up in the petition is that the justice of the peace had not jurisdiction to render the judgment sought to be enjoined, at the time it was rendered. It is not stated in the petition nor is it contended by counsel for plaintiffs in error that the justice had not at one time jurisdiction of the subject-matter involved in, as well as of the parties to, the suit. Therefore, if he lost jurisdiction of the case by adjourning it to an uncertain and unknown time, which I think it must be conceded that he did, the case is within the law of that of *Gould v.*

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Loughran, 19 Neb., 392, cited by counsel for defendant in error. In that case it was held that such judgment could only be corrected by a direct proceeding for that purpose, and not by injunction.

Again, it is not alleged in the petition that the said judgment was unjust, nor that the defendants therein, plaintiffs in the injunction case and plaintiffs in error here, were the owners of the property involved in the replevin case. Neither is it alleged in the petition that the plaintiffs therein were without an adequate remedy at law for any wrong suffered or threatened; nor that either fraud, accident, mistake, or circumstances beyond their control had intervened to deprive them of any right or remedy. Neither is it alleged that either of the defendants are insolvent. The case is therefore quite within the law as laid down by the supreme court of the United States in *Hendrickson v. Hinckley*, 17 How. [U. S.], 442. Also cited by counsel for defendants in error, where Mr. Justice Curtis said: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, because it did not amount to a legal defense or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."

I do not think that the petition states facts sufficient to constitute a cause of action. The demurrers were therefore rightly sustained.

The judgment of the district court is affirmed and the cause dismissed.

JUDGMENT ACCORDINGLY.

MAXWELL, J., concurs.

NORVAL, J., did not sit.

D. L. THOMPSON V. C. C. BENNER.

[FILED OCTOBER 14, 1891.]

Instructions set out in the opinion, *held*, not applicable to the testimony and an erroneous statement of the law.

ERROR to the district court for Richardson county.
Tried below before APPELGET, J.

J. D. Gilman, and *Isham Reavis*, for plaintiff in error, cited: *Bonns v. Carter*, 20 Neb., 566; *Wellington v. Wentworth*, 8 Mct. [Mass.], 548; 1 Addison, Torts, 497; *St. John v. O'Connell*, 7 Port. [Ala.], 466; *Yale v. Saunders*, 16 Vt., 243; *Perry v. Corby*, 21 Fed. Rep. [Mo.], 737; *Winner v. Hoyt*, 28 N. W. Rep. [Wis.], 380; *Brown v. Work*, 30 Neb., 800.

E. W. Thomas, and *C. Gillespie*, *contra*, cited: *Miller v. Finn*, 1 Neb., 288; *Clark v. Tennant*, 5 Id., 557; *Ahlman v. Meyer*, 19 Id., 66; *West. Ins. Co. v. Putnam*, 20 Id., 334; *Brown v. Hurst*, 3 Id., 356; *Seymour v. Street*, 5 Id., 89; *Blackburn v. Ostrander*, Id., 219; *Converse v. Meyer*, 14 Id., 191; *Everett v. Hobleman*, 15 Id., 376; *McCormick v. Loughran*, 16 Id., 89; *Durrell v. Hart*, 25 Id., 610; *Maxwell*, Just. Prac. [5th Ed.], 603; *Faulkner v. Meyer*, 6 Neb., 414; *Taylor v. Ryan*, 15 Id., 579; *Nelson v. Garey*, Id., 535; *Fletcher v. Daugherty*, 13 Id., 224; *Langdon v. Bud*, 9 Wend. [N. Y.], 80; *Brown v. Phillips*, 3 Bush [Ky.], 656; *Hopkins v. Thompson*, 2 Port. [Ala.], 433; *Holmes v. Sprowl*, 31 Me., 73; *Pratt v. Harlow*, 16 Gray [Mass.], 379; *Worthington v. Hanna*, 23 Mich., 530; *Peckinbaugh v. Quillin*, 12 Neb., 586; *Hamilton v. Lau*, 24 Id., 59; *Bonns v. Carter*, 20 Id., 566.

MAXWELL, J.

In February, 1888, one Clinton F. Benner, a minor, bought a small confectionery and cigar store in Falls City, for which he paid about \$450 with money furnished him by his mother. Afterwards she let him have a note for about \$300, which he used as collateral to obtain money at one of the banks, and later she seems to have advanced about \$150 more. Soon after Clinton engaged in this business his mother removed to Falls City and she and her family seems to have drawn largely for the means of support from the store of her son. The son kept enlarging his stock so that by July 1st of that year it was worth \$2,500.

The defendant in error claims to have loaned his brother about \$650 between July 4th and August 25th of that year, while the stock in the store during this period seems to have been very much increased, and on September 24, 1888, was worth about \$6,500. The great increase in the stock and in the debts may have come from the inexperience of Clinton, and the ease with which persons believed to be honest can obtain credit; or the increase may have been made from a design of Clinton and others to defraud his creditors. This is a question of fact to be determined by a jury.

On September 24, 1888, Clinton seems to have exhausted his credit and creditors were pressing for their claims, whereupon about September 24, 1888, he executed a note for \$1,924.80 and two chattel mortgages to his brother, the defendant, upon "the stock of goods, merchandise, and fixtures situated in what is commonly known as Postoffice store in Falls City, Nebraska, the said stock of goods consisting of groceries, confectioneries, cigars and tobacco, queensware, hardware, cutlery, toys, holiday goods, show-cases, the soda fount and fixtures, books and papers, stationery, the awning and store, and all the goods, mer-

chandise, and fixtures of every kind and character situate in said store-room and cellar," etc. The defendant claims to have purchased the claims of his mother and sister against Clinton and to have given his own notes for the same, and that said claims together with his own amount to the sum secured by the mortgage. Certain creditors of Clinton for the goods in question recovered judgments against him, and caused executions to be issued thereon, which were placed in the hands of the plaintiff in error, who levied upon the stock of goods and sold a sufficient amount to satisfy said executions.

This action is brought against the officer for the wrongful conversion of the goods by reason of said sales.

On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered.

The court instructed the jury as follows :

"You are further instructed, as a matter of law, that a debtor in failing circumstances has a right to prefer one creditor to another and to pay one creditor with goods obtained on credit from another creditor, and in this case, if you believe from the evidence that Clinton Benner was lawfully indebted to Charles Benner as claimed, and that Clinton Benner, finding that he could not pay all his debts, transferred the goods in controversy to Charles Benner, and gave Charles Benner full and complete possession of the same under the chattel mortgages introduced in evidence, then upon this question of Charles Benner's rights to the property as against Thompson, defendant, you should find for the plaintiff Charles Benner, in this case, unless you believe from the evidence that there is fraud in these transactions participated in by Charles Benner or of which said Charles Benner had due notice. If these transactions are shown to you by the evidence to be in good faith, and Charles Benner had full and complete possession of the property for the purpose of paying his debt, then Thompson, the defendant, had no right to take the property from

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him, and you should find in favor of this plaintiff, the amount of his damages not however to exceed the full sum of the debt due Charles Benner, and interest.

"That in order to prove the good faith of the notes and mortgages held by Charles Benner, it is not necessary for him to do more than show the honesty and good faith character of the transactions by the evidence of himself and the other witnesses, and circumstances, and notes, checks, drafts, and papers that have been introduced in evidence to you, and if you believe from the evidence that all the transactions were honest and in good faith on the part of Charles Benner, you should so find in your verdict. For a creditor violates no rule of law when he takes payment of his debt, though he knows that other creditors are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims.

"That the two chattel mortgages introduced in evidence in this case, if you believe from the evidence in this case were made and received in good faith on the part of Charles Benner, mortgagee, then it is sufficient to invest him, Charles Benner, with the right to take the property therein described, and to have the same turned over to him by Clinton Benner, mortgagor, and to retain the said property for the purpose of selling it as provided in the mortgages, for the purpose of satisfying his claim with the proceeds of the sale of said property. Then you are instructed that no one had any right to take the goods from the possession of Charles Benner without first paying off his claims, and if it was so done, the party who thus took the goods from him are liable in damages, for the damages done Charles Benner by so doing, to the extent of his lien with the interest thereon.

"The jury are further instructed that the law presumes that all persons transact their business honestly and in good faith until the contrary appears from a preponderance of the evidence, and the burden of proving fraud is always on

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the party alleging the fraud, and you are instructed that all persons are presumed to be innocent of intentional wrong until they are proved to be guilty, and all persons are presumed to transact their business in good faith and for a lawful purpose, and when an act can as well be attributed to an honest intent and purpose as to a corrupt or unlawful one, then the jury are bound to attribute the act to an honest intent and to a lawful purpose.

"INSTRUCTIONS ASKED FOR ON BEHALF OF DEFENDANT.

"If the jury believe from the evidence that the plaintiff got possession of the goods in question from his brother while in a failing condition, and when he was known to be insolvent and largely in debt, and that such possession was taken under chattel mortgages upon all the property of the mortgagor, and for a sum larger than that owing from Clinton F. Benner to his brother, the plaintiff, and said plaintiff knew that the goods so mortgaged were not paid for, all these circumstances may be taken into consideration by the jury in determining whether the plaintiff was a *bona fide* mortgagee of the goods.

"If the jury find from the evidence that said mortgages were given in fact to secure debts owing from Clinton F. Benner to his mother and sister, in addition to what he was owing to his brother, the plaintiff, then you are instructed that said mortgages create a trust in favor of said mother and sister, and as such must be held to be an assignment for the benefit of creditors, and, not being in conformity with the act relating to voluntary assignments, must be held to be void, and the plaintiff cannot recover.

"CHARGE OF THE COURT.

"GENTLEMEN OF THE JURY: This is an action brought by the plaintiff for the recovery of damages against the defendant, as an officer, for an alleged taking and conversion by him of certain goods and property of the plaintiff.

"2. The gist of this action is, first, the ownership of said

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property by the plaintiff, and, secondly, the unlawful taking of the same by the defendant.

"3. The jury in arriving at your verdict have a right to take into consideration all the circumstances surrounding the case as adduced before you by the evidence.

"4. In making up your verdict you are instructed by the court that brothers and other members of a family have a right to do business with each other, and such business is just as lawful as if the same business was done with any other person, but the court further instructs you that when the rights of other parties, not members of the family, are prejudiced by such transaction, then, and in that case, it is your duty to scrutinize such acts closely, for the purpose of ascertaining the good faith of the transaction.

"5. The court further instructs you that in arriving at a conclusion as to the amount due this plaintiff from Clinton F. Benner you should examine the transaction between plaintiff and his mother and sister, and if you shall find from a preponderance of the evidence that prior to the time that the chattel mortgage was given to this plaintiff by his brother, this plaintiff purchased said claims from his mother and sister, and became wholly and absolutely responsible to them for the payment of said claims, then the amount of plaintiff's claim in this action is the combined amounts of his own claim, and also the amounts that had heretofore belonged to the sister and the mother; but if the jury shall find from the evidence that this plaintiff, prior to the time that he took the mortgages mentioned in this case, had not so purchased the claims of the mother and sister, and become absolutely responsible to them for the same, then, and in that case, the court instructs you that the claims of the mother and sister were not the property of this plaintiff.

"6. The court instructs you that if you shall find from a preponderance of the evidence that the goods claimed by the plaintiff to have been taken by the defendant were so

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taken by him, and if you shall further find from the evidence that the said goods and property so taken were the property of and in possession of the plaintiff, then the amount of plaintiff's damage is the amount of his claim and interest, provided such claim does not exceed the value of the goods taken by the defendant.

"7. The court also instructs you that if you shall find from the evidence that the goods and chattels claimed in his, plaintiff's, petition to have been taken by the defendant were not the property of the plaintiff or that the defendant did not take the same, then your verdict should be for the defendant."

These instructions do not submit the question of fraudulent intent. Undue importance is given to the right of a debtor to prefer his creditors, and the important questions involved in the case are entirely lost sight of. Such instructions could not fail to confuse a jury and evidently did so in this case. We do not care to particularize the various defects and errors therein, which are apparent from a mere inspection.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

FRANK FAULKNER V. S. N. WHITE & SON.

[FILED OCTOBER 14, 1891.]

Negotiable Instruments: FRAUDULENT TRANSFER BY BAILEE:
BONA FIDE PURCHASER. A promissory note made by R. in favor of F. was secured by a mortgage on real estate. About the time the note became due the payee indorsed it in blank

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and delivered it to one S. to effect a trade with a third party. S. did not effect the trade but disposed of the note for his own benefit to one W. for goods for about two-thirds of its face value. Afterwards the maker and payee of the note entered into an agreement by which it was paid in full and the mortgage discharged. Afterwards W., the purchaser of the note from S. and who had possession of the same, brought an action thereon against F. as indorser. *Held*, That as the indorser had clothed S. with apparent authority to dispose of the note, that the indorser was bound by this action of S.; but as he had disposed of the same in fraud of the rights of his employer, the transferee could recover only the amount paid with interest thereon.

ERROR to the district court for Colfax county. Tried below before POST, J.

Grimison & Thomas, for plaintiff in error, cited: *Haas v. Sackett*, 41 N. W. Rep. [Minn.], 237; *Chase v. Whitmore*, 9 Pac. Rep. [Cal.], 942.

Phelps & Sabin, *contra*, cited: *Chase v. Whitmore*, 9 Pac. Rep. [Cal.], 944; *Combes v. Chandler*, 33 O. St., 184; *Moore v. Bank*, 55 N. Y., 41; *Pomeroy*, Leg. Rem., 160; *Oberne v. Burke*, 30 Neb., 581; *Webster v. Wray*, 17 Id., 579; *Shamp v. Meyer*, 20 Id., 223; 1 *Lawson*, Rights, Rem. & Prac., sec. 57.

MAXWELL, J.

This action was brought in the district court of Colfax county by the defendants in error against the plaintiff in error, the cause of action being set forth in the petition as follows:

"On the 16th day of October, 1884, the defendants Ralston executed and delivered to the defendant Faulkner, his certain promissory note, in words and figures following:

"\$45.00. SCHUYLER, NEB., Oct. 16, 1884.

"Nine months after date, for value received, I, E. D. Ralston, promise to pay to the order of Frank Faulkner

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forty-five dollars, with interest at the rate of 10 per cent per annum from date. The drawers and indorsers severally waive presentment for payment, protest, and notice of non-payment of this note, and all defenses on ground of extension of time of its payment that may be given by the holders to them, or either of them. E. D. RALSTON.'

"To secure the payment of said note the defendant Ralston and his wife, on the 16th day of October, 1884, executed and delivered to the defendant Faulkner their certain mortgage deed, and thereby conveyed to the said Faulkner the following described premises: Lots 5, 6, and 7, in block 39, in Clarkson's first addition to Schuyler.

"That on the — day of —, 188 —, the date and time being unknown to these plaintiffs, the defendant Faulkner indorsed said note and sold and transferred the same to the defendant Smith, conferring upon him the apparent absolute ownership and all the *indicia* of title, with full power to sell, transfer, or do with it whatsoever he chose.

"On the 9th day of January, 1885, said note being then wholly unpaid and a valid and binding obligation, with no defense existing against it, the defendant Smith, he being at that time the owner and holder thereof, indorsed and transferred the same to these plaintiffs for a valuable consideration in the due course of business, who then became and ever since have been the owner thereof.

"On the 25th day of September 1886, the defendant Faulkner paid these plaintiffs on said note the sum of \$18.50.

"That on the 18th day of March, 1886, the defendants Ralston and Faulkner entered into the following agreement:

"Know all men by these presents, that I, Frank Faulkner, of Schuyler, Colfax Co., Neb., am held and firmly bound unto E. D. Ralston, of the same place, in the penal sum of \$800, for the payment of which, well and truly to be

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made, I do hereby bind myself, my heirs, executors, and assigns, if default be made in the condition following, viz.: Whereas, James Edmison and wife have conveyed to me by general warranty the S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of sec. 3, town 18 north, of range 3, in Colfax county, Neb., in consideration of which and of the covenants hereinafter conditioned on my part to be kept and performed, the said E. D. Ralston and wife have conveyed to Matilda Edmison lots 5, 6, and 7 in block 39, in Clarkson's first addition to the town of Schuyler: Now, therefore, I, in consideration, hereby agree and undertake to pay to said E. D. Ralston the sum of \$100, and to release and discharge a mortgage which I now hold against said last described, and to pay and satisfy a certain mortgage and the debt thereby secured, which (a third person named) holds against said last described premises, with interest accrued and to accrue thereon, and to pay all taxes, liens, and assessments against said premises which said E. D. Ralston may be justly and legally liable and bound to pay. Upon the fulfillment of the foregoing conditions and covenants this obligation to be void, otherwise to be and remain in full force and effect.

"In testimony whereof I have hereunto set my hand this 18th day of March, 1886.

"FRANK FAULKNER.

"In presence of

"GEO. H. THOMAS.'

"The plaintiff further alleges that this agreement entered into between the defendants Faulkner and Ralston was entered into with the intention and purpose, among other things, of making provision for the payment of said note and mortgage held and owned by the plaintiff.

"That on the 30th day of April, 1886, the defendant Faulkner satisfied and released said mortgage given as security for said note, of record, no part of said note has been paid except said sum of \$18.50, and there is now due the plaintiff from the defendant on said note and agree-

ment the sum of \$35.20 and interest at ten per cent from the 23d day of September, 1886."

The answer contains a number of specific denials and admissions. It is admitted that the plaintiff in error paid the defendants in error on the claim the sum of \$18.50, but it is alleged that this was done as a friendly act and not as a recognition of the note. The reply is a general denial.

On the trial of the cause the court found the issues in favor of the defendants in error for the full amount of the note and rendered judgment accordingly.

The testimony sustains the principal allegations of the petition.

There is a paucity of dates in the pleadings and evidence which renders it difficult to determine the exact time when certain transactions took place. It does appear, however, that about the month of March, 1886, the contract was entered into with Ralston and the conveyance received by which the note in question became satisfied and the mortgage discharged. Prior to this time the defendant in error had indorsed the note, and delivered the same to Smith, who traded it to the defendants in error for a stove worth about \$30. The defendants in error claim to be innocent purchasers of the note for a valuable consideration and without notice, and there is testimony in the record tending to establish that defense. Smith, however, had no right morally to transfer the note for his own benefit. It was in violation of the trust reposed in him by the plaintiff in error. In other words, Smith had apparent authority to transfer the note, and did so transfer it to the defendants in error; but if the testimony before us is true, he fraudulently abused the trust placed in him by the plaintiff in error, and converted the note to his own use and received about two-thirds of the face value thereof. The note was not his. It was converted in fraud of his principal, and the same rule will be applied as when the instrument was obtained by fraud, viz., that the purchaser

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will be protected only to the extent of the consideration paid by him. The judgment of the court below, therefore, will be modified to conform to this opinion, and as thus modified will be

AFFIRMED.

THE other judges concur.

**RICE & GORUM, APPELLANTS, v. GEORGE DAY,
APPELLEE.**

[FILED OCTOBER 14, 1891.]

1. **Attorney's Lien: PARAMOUNT TO SET-OFF.** The lien of an attorney upon a judgment obtained by him to the extent of his reasonable fees and disbursements, is paramount to any rights of the parties in the action or to any set-off.
2. ———: **REASONABLE FEES.** The question of what were reasonable fees, having been put in issue and determined by the trial court, *held*, that the evidence sustained the judgment.

APPEAL from the district court for Gage county. Heard below before **BROADY, J.**

A. D. McCandless, and *T. F. Burke*, for appellants, cited: *Ward v. Watson*, 27 Neb., 68; 1 Am. & Eng. Ency., 972; *People v. N. Y.*, 13 Wend. [N. Y.], 649, and cases; *Brown v. Sayce*, 4 Taunt. [Eng.], 321; *Tiffany v. Stewart*, 60 Ia., 207; *Watson v. Smith*, 63 Id., 228; *Yorton v. R. Co.*, 23 N. W. Rep. [Wis.], 401, and cases; *Nicoll v. Nicoll*, 16 Wend. [N. Y.], 446; *Brown v. Reed*, 21 Am. L. R., 75, and cases.

Pemberton & Bush, and *T. D. Cobbey*, *contra*, cited: *Boyer v. Clark*, 3 Neb., 161; *Ward v. Watson*, 27 Id.,

68; *Robertson v. Shutt*, 9 Bush [Ky.], 660; *Stratton v. Hussey*, 62 Me., 288; *Ourrier v. R. Co.*, 37 N. H., 223; *Johnson v. Ballard*, 44 Ind., 270; *Carter v. Davis*, 8 Fla., 183.

MAXWELL, J.

On the 9th of April, 1889, the plaintiffs in error recovered a judgment in justice court against the defendant for the sum of \$100 and costs. That action appears to have been accompanied by an attachment of the property of the defendant. A motion was afterwards made "to discharge the attachment because the facts stated in the affidavits are false and untrue." This motion was sustained and the attachment dissolved and an action thereupon brought on the undertaking, which resulted in a judgment for the defendant in error for the sum of \$110. The attorneys for the defendant in error (three in number) filed a claim for a lien upon this judgment for the sum of \$100, and the plaintiffs in error pray that their judgment against the defendant be set-off against his to the extent of \$100. The court found in favor of the attorneys, and deducted the amount claimed by them for fees in the case before setting off one judgment against the other. In this there is no error. Whatever the rule may be in other states it is well settled in this state that the lien of an attorney upon a judgment to the extent of his reasonable fees and disbursements, is paramount to any rights of the parties in the suit or to any set-off. (*Boyer v. Clark*, 3 Neb., 161; *Ward v. Watson*, 27 Id., 768.) This rule, if unsatisfactory, should be changed by the legislature and not by the court; but until so changed will be adhered to.

On several points the transcript is very meagre. The fees charged, when we consider the amount involved, seem large, but the question of their being reasonable was before the trial court on a distinct issue to that effect, and the

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evidence fully supports the judgment of the court. The judgment is therefore

AFFIRMED.

THE other judges concur.

ANDREW HAAS, APPELLANT, v. JULIUS ROTHSCHILD
ET AL., APPELLEES.

[FILED OCTOBER 14, 1891.]

Partnership: PROFIT SHARING: CREDITORS. One R. entered into partnership with Van H. & Co. in the business of buying stock, Van H. & Co. to furnish the money, and the profits and losses to be equally divided between the parties. R. purchased several car loads of fat cattle, which were paid for by Van H. & Co., and sold the same, but before payment a creditor of R. sought by legal proceedings to appropriate the money to the payment of his claim, whereupon Van H. & Co. filed a petition of intervention in which they set up the facts in relation to the partnership. *Held*, That the proof sustained the petition for intervention, and that there was a partnership, but failed to show any profits to R. in the transaction, and therefore nothing which could be applied to the claim of H.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

Thomas D. Crane, and *William E. Healey*, for appellant:

On the doctrine of *partnership inter se*: 3 Kent's Com., sec. 25; Parsons, Partnership, ch. 5, sec. 51; Pollock, Partnership, 3, 4; *Cox v. Hickman*, 8 H. L. Cas. [Eng.], 268, 306, 312, 314; *Bullen v. Sharp*, 1 L. R. C. P. [Eng.], 86*; 1 Lindley, Partnership, 44, 45; *Hoare v. Dawes*, 1 Doug. [Eng.], 371; *Coope v. Eyre*, 1 H. Bla. [Eng.], 37; *Gibson v. Lupton*, 9 Bing. [Eng.], 297; *Newman v. Bean*, 21 N. H.,

93; *Loomis v. Marshall*, 12 Conn., 69; *Story, Partnership*, secs. 40, 69; *Gilpin v. Enderbey*, 1 D. & R. [Eng.], 570; *Morse v. Wilson*, 4 T. R. [Eng.], 353; 1 Collyer, *Partnership*, sec. 1, pp. 38-41; *Hesketh v. Blanchard*, 4 East Rep. [Eng.], 144, 146; *Smith v. Watson*, 2 Barn. & Cress. [Eng.], 401; *McNeill v. Reynolds*, 9 Ala., 313; *Gray v. Palmer*, 9 Cal., 616; *Robinson v. Green*, 5 Harr. [Del.], 115; *Wilson v. Colman*, 1 Cranch [D. C.], 408. The court cannot order the fund paid over to Van Hoven & Co. in these proceedings. (*Fessler v. Hickernell*, 82 Pa. St., 150; *Parker v. Wright*, 66 Me., 392; *Newbrau v. Snider*, 1 W. Va., 153; *Brown's Ex'r v. Higginbotham*, 5 Leigh [Va.], 583; *Graham v. Holt*, 3 Ired. [N. Car.], 300; *Murray v. Bogert*, 14 Johns. [N. Y.], 318; *Course v. Prince*, 1 Mill [S. Car.], 416; *Burley v. Harris*, 8 N. H., 233; *Lawrence v. Clark*, 9 Dana [Ky.], 257; *Bonnafe v. Fenner*, 6 S. & M. [Miss], 212; *Thompson v. Steamboat*, 2 O. St., 26; *Wilson v. Soper*, 13 B. Mon. [Ky.], 411; 3 Pom. Eq. Jur., sec. 1421; *Russell v. Byron*, 2 Cal., 86.) As to the question of equitable assignment: *Scott v. Porcher*, 3 Merivale [Eng. Ch.], 652, 664; *Lowery v. Steward*, 25 N. Y., 239; *Jones, Liens*, secs. 32, 51, 69; 3 Pomeroy, Eq. Jur., secs. 1282, 1283, and note; *Cook v. Black*, 54 Ia., 693; *Gibson v. Stone*, 43 Barb. [N. Y.], 285; *Allen v. Montgomery*, 48 Miss., 101; *Christmas v. Russell*, 14 Wall. [U. S.], 69; *Trist v. Child*, 21 Id., 441; *Ex parte Nail Co.*, 16 Bank Reg., 448; *Christmas' Adm'rs v. Griswold*, 8 O. St., 558; *Rogers v. Hosack*, 18 Wend. [N. Y.], 319; *Dickenson v. Phillips*, 1 Barb. [N. Y.], 461; *Clayton v. Fawcett*, 2 Leigh [Va.], 19; *Hopkins v. Beebe*, 26 Pa. St., 85; *Hall v. Jackson*, 20 Pick. [Mass.], 194; 2 Hare & Wallace's *Notes to Leading Cases*, pt. 2, 233; *Arnold v. Frost*, 9 Ben. [U. S.], 268; *Walker v. Seigel*, 12 Bank Reg., 395; *Williams v. Ingersoll*, 89 N. Y., 518; *Coates v. Bank*, 91 Id., 31; *Chapin v. James*, 23 Am. Rep. [R. I.], 417; *Stearnes v. Ins. Co.*, 26 Am. Rep. [Mass.], 649; *Natl. Ex. Bank v.*

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McLoon, 40 Am. Rep. [Me.], 393; *Meyers v. R. Const. Co.*, 100 U. S., 477; *Union Ins. Co. v. Glover*, 9 Fed. Rep. [Me.], 532; *Pearce v. Roberts*, 27 Mo., 179; *Ford v. Garner*, 15 Ind., 298; *Hoyt v. Story*, 3 Barb. [N. Y.], 262.

Joy, Hudson & Joy, for Van Hoven & Co., intervenors:

An agreement to share profits and losses constitutes a partnership. (*Story*, Partnership, sec. 58 and cases; *Lindley*, Partnership, sec. 1, p. 92; *Strader v. White*, 2 Neb., 348; *Pettee v. Appleton*, 114 Mass., 114; *Beauregard v. Case*, 91 U. S., 134; *Champion v. Bostwick*, 18 Wend. [N. Y.], 185; *Smith v. Hollister*, 32 Vt., 695; *Story*, Partnership, sec. 56.) The rights of an attaching creditor against a garnishee are not superior to those of a debtor. (*Hollingsworth v. Fitzgerald*, 16 Neb., 492; *Hathaway v. Russell*, 16 Mass., 473; *Weil v. Tyler*, 90 Am. Dec., 441; *Whipple v. Robbins*, 93 Id., 64; *Smith v. Clarke*, 9 Ia., 241; *Burton v. Dist. Twp.*, 11 Id., 166; *Cox v. Russell*, 44 Id., 556; *Powers v. Large*, 69 Wis., 621; *Thurber v. Blanck*, 50 N. Y., 80; *Nassauer v. Techner*, 65 Wis., 388.) Rothschild is bound by the judgment whether he appeared or not, and whether it is partnership property or not. (*Born v. Staaden*, 24 Ill., 320; *Fisk v. Weston*, 5 Me., 410; *Wade*, Attachment, sec. 54; *Bray v. Saaman*, 13 Neb., 513.) There was an equitable assignment of the cattle and the proceeds of the cattle by the defendant to the intervenors. (*Brought v. Griffith*, 16 Ia., 32; *Randolph*, Com. Paper, sec. 1434; *Shutts v. Fingar*, 100 N. Y., 539; *Eaton v. Hasty*, 6 Neb., 419; *Wilson v. Burney*, 8 Id., 43; 2 *Story*, Eq. Jur., 365; *Kimball v. Donald*, 20 Mo., 577; *Shannon v. Hoboken*, 37 N. J. Eq., 123; *East Lewisburg Lumber Co. v. Marsh*, 91 Pa. St., 96; *Pass v. McOrea*, 36 Miss., 143; *Newby v. Hill*, 2 Met. [Ky.], 530; *Arpin v. Burch*, 32 N. W. Rep. [Wis.], 681; *McWilliams v. Webb*, 32 Ia., 577; *Conway v. Cutting*, 51 N. H., 407; *Walker v. Mauro*, 18 Mo., 564; *Cutts v. Perkins*, 12 Mass.,

206. This is a trust fund and the intervenors are entitled to enforce the equitable rights of a *cestui que trust*. (*Pennell v. Deffell*, 4 De G., M. & G. [Eng.], 372; *Firth v. Cortland*, 2 H. & M. [Eng.], 417; *Knatchbull v. Hallett*, 13 L. Rep., Ch. Div. [Eng.], 696, 709; *Van Allen v. Bank*, 52 N. Y., 1; *People v. Bank*, 96 Id., 32; *U. S. v. Waterborough*, Davies [U. S.], 154; *N. Bank v. King*, 57 Pa. St., 202; *MoLeod v. Evans*, 66 Wis., 401; 2 Story, Eq. Jur., sec. 1258; *Snell*, Eq. Jur., 155; *Frances v. Evans*, 33 N. W. Rep. [Wis.], 93; *Bowers v. Evans*, 36 Id., 629; *Third Natl. Bank v. Gas Co.*, 30 N. W. Rep. [Minn.], 440; *Peak v. Ellicott*, 30 Kan., 156; *Thompson v. Gloucester Sav. Inst.*, 8 Atl. Rep. [N. J.], 97; *Hoffman v. Bank*, 46 N. J. L., 604; *Sweeny v. Easter*, 1 Wall. [U. S.], 166; *Hook v. Pratt*, 78 N. Y., 371; *Parsons*, Bills, 21, 23; *Morse*, Banking, 420; *Natl. Bank v. Ins. Co.*, 104 U. S., 54.)

MAXWELL, J.

The plaintiff brought an action in the district court of Douglas county against Julius Rothschild to recover the sum of \$8,180.30, and Savage & Green, commission dealers of South Omaha, were served with garnishee process, and it appeared from their answer that they had in their possession more than \$8,000 derived from the sale of certain cattle sold by them for the defendant Rothschild. At this stage of the case Van Hoven & Co. filed a petition of intervention, as follows:

"Now comes Van Hoven & Co., a copartnership doing business at Sioux City, Iowa, and respectfully represents to the court that during the winter of 1888 a copartnership was formed between the defendant Julius Rothschild and the intervenor Van Hoven & Co., for the purpose of purchasing and shipping cattle; that the agreement of copartnership was oral, and in substance as follows: That the firm of Van Hoven & Co. were to furnish the money to purchase the

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stock and pay for the same; that the defendant Rothschild was to give his time and attention to the purchasing and shipment of stock, and was to share equally with the firm of Van Hoven & Co. in the losses and profits realized upon the purchase and sale of stock as aforesaid; that the said Van Hoven & Co. were to own the stock so purchased and paid for by them; that defendant had only an interest in the profits realized therefrom. That during the winter and spring of 1888 several purchases of stock were made under said agreement, the intervenors paying for the stock so purchased and sharing the losses and profits with said Julius Rothschild; that about the 9th of May, 1888, ten car loads of fat cattle which had been purchased in Dakota county under said agreement were shipped from Dakota county, Nebraska, by way of Omaha to Chicago; that by agreement between the said Van Hoven & Co. and said defendant, said stock was to be shipped to A. Piatt & Co., Chicago, and a draft for \$10,000 was drawn by Van Hoven & Co. on A. Piatt & Co., which draft was to be paid out of the proceeds of said stock so shipped; that the said draft so drawn was immediately forwarded to Chicago for collection and payment thereof demanded from the said A. Piatt & Co.; that the said Rothschild wrongfully and without authority billed the said cattle paid for by Van Hoven & Co. to himself at Chicago, Illinois; that the said stock, by directions of the said Rothschild, was unloaded at the stock yards at South Omaha, Nebraska; that the said stock was placed in said stock yards with Savage & Green, live stock and commission men at said stock yards, with instructions to sell the same if, in their judgment, more could be realized from the sale of said stock at Omaha than could be realized by forwarding the same to Chicago; that the said Rothschild instructed the said Savage & Green to sell the said stock on account of A. Piatt & Co., of Chicago, and forward the money to said firm, telling the said Savage &

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Green that a draft of \$10,000 had been drawn on A. Piatt & Co. to be paid out of the proceeds of said cattle, and that the said A. Piatt & Co. must either have the cattle or the proceeds thereof; that on the 11th day of May, 1888, the said Savage & Green sold nine car loads of said stock for \$8,663.89, which amount less charges \$324.60, freight \$41, yardage \$31, and commissions \$82, leaving \$8,185.29; that the stock was sold under the direction of the said Julius Rothschild, given on the 10th day of May aforesaid, on account of A. Piatt & Co., and the net proceeds of said sale, \$8,185.29, was placed to the credit of A. Piatt & Co. upon the books of Savage & Green; that after the sale of the said stock, and while they were weighing the last car load thereof, the garnishee process, issued in the case of *Andrew Haas v. Julius Rothschild*, was served upon the said Savage & Green; that immediately after the said sale had been made on account of A. Piatt & Co. the said Savage & Green informed the said A. Piatt & Co. that the said stock had been sold on their account, and the amount realized therefrom placed to their credit, but that a garnishee process had been served upon them and they should be compelled to retain said money to abide the order of the court; that the said A. Piatt & Co. claims the said money and demanded the same.

"The intervenor further states there was no profit realized in the purchase and sale of said stock, but that a loss was sustained; that the said Julius Rothschild had no interest in the said cattle or the proceeds arising from the sale thereof; that by agreement and arrangement made between the said Van Hoven & Co. and the said Rothschild prior to the 9th day of May, 1888, the proceeds of said sale of said stock was to be applied and used in the payment of said \$10,000 draft drawn upon said A. Piatt & Co.; that the balance due from the said Savage & Green, as shown by the said garnishee's answer, belongs to the firm of Van Hoven & Co.; that the said stock cattle

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sold by the said Savage & Green were purchased, paid for by the said Van Hoven & Co., and the said firm were entitled to the proceeds thereof, the said Julius Rothschild having only a one-half interest in the profits and losses growing out of and realized from said transaction. The intervenors aver that no profits were made upon said purchase and sale of said stock cattle; that after the money realized from the sale of said stock on the 11th of May, 1888, was garnished said A. Piatt & Co. on the 12th day of May, 1888, refused to pay said draft, and that the intervenors have been compelled to take up and pay the same and now hold the said draft.

"Therefore the intervenors say they are entitled to the said money now held by the said garnishees, and claim the same as against the plaintiff, defendant, and said garnishees, and pray that they may be adjudged to be entitled to said money and that the same be ordered to be paid over to said intervenors, and that they recover their costs in this suit."

On the trial of the cause the court found "that the money garnished in this case and now in the custody of the court, to-wit, the sum of \$8,408.97 with interest at the rate of four per cent per annum from the 21st day of June, 1888, is the property of Van Hoven & Co., the intervenors herein; that said intervenors are entitled to have said money paid over to them as in their petition prayed, to which the said plaintiff excepts; that said Julius Rothschild and the said intervenors were partners, and that the interest, if any, of the said Rothschild in the said money was garnished in the hands of Savage & Green by the said plaintiff in said attachment proceedings, but the court further finds that at the time of the said attachment and garnishment the said Julius Rothschild had no interest in the partnership assets or effects, but was largely indebted to the said firm of Van Hoven & Co.

"It is therefore considered by the court that the attach-

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ment heretofore granted in this action, in so far as it affects the said money, be, and the same is hereby, vacated and discharged, and Frank E. Moores, clerk of this court, is hereby ordered to pay the said \$8,408.97 with interest at the rate of four per cent from the 21st day of June, 1888, over to the said Van Hoven & Co. or their attorneys."

To this judgment the plaintiff objects and has brought the case into this court for review. It is claimed that the evidence fails to show a partnership between Van Hoven & Co. and Rothschild. In this, however, the plaintiff is mistaken.

W. C. Hudson testifies that Rothschild was a member of the firm of Van Hoven & Co., and that he was to purchase stock in his own name. He testifies, "Rothschild was to do the work and buy the stuff to ship, and we were to share the profits and losses equally between the firm of Van Hoven & Co. and Rothschild." He enters into the details of the agreement, which need not be considered here.

George B. Green, a member of the commission firm of Savage & Green, testifies in substance that Mr. Rothschild admitted the debt to the plaintiff, but said it could not be paid out of that stock, as he was not the owner thereof. Green testifies as to the directions given by Rothschild when the stock was received as follows:

Q. Do you recollect what was done, what instructions were given you to sell the cattle, as stated by your partner?

A. Yes, sir; it was the day they came in, along about noon, I should think; he says if we sell the cattle why the proceeds must be forwarded to A. Piatt & Co., Chicago, and he remarked that the market was not very good that day; he said he supposed he would not sell, he would forward the cattle to Piatt & Co., but the next day the market was better, and then he instructed us again to forward the money to Piatt.

Q. This was all prior to the garnishment?

A. O yes, this was before the cattle were weighed.

Redirect examination, by Mr. Crane :

Q. He said at first that the money should go to Van Hoven & Co.?

A. No; to Piatt.

Q. Didn't he say anything about the money going to Van Hoven & Co.?

A. He said that the cattle belonged to Van Hoven & Co. The day after, when Mr. Hudson was down here with him, he told me then that Van Hoven & Co. had paid for the cattle and had made a draft on Piatt in Chicago.

Q. Afterwards, he said the money should go to Piatt & Co. in Chicago?

A. He told me the money was going to Piatt & Co. the day the cattle were brought in. He did not say anything about Van Hoven until after the garnishee.

Q. After the garnishee he spoke of Van Hoven?

A. He said that Van Hoven & Co. had paid for the cattle.

The clear weight of testimony sustains the petition for intervention, and the proof fails to show that Rothschild had any interest in the stock in controversy, as it seems to have been sold at a loss. The judgment is therefore

AFFIRMED.

THE other judges concur.

J. I. CASE PLOW WORKS V. JACOB MARR ET AL.

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[FILED OCTOBER 14, 1891.]

1. **Chattel Mortgages: CLAUSE ALLOWING SEIZURE BY MORTGAGEE.** A clause in a chattel mortgage providing that the mortgagee may, at any time he feels insecure, treat the debt as due and take and sell the property, will not authorize the seizure and sale of the property unless the mortgagor is about to do, or has done, some act which tends to impair the security.
2. **The evidence examined, and held,** not to sustain the verdict and judgment.

ERROR to the district court for Hitchcock county. Tried below before COCHRAN, J.

George E. Banks, for plaintiff in error.

J. W. Cole, *contra*.

NORVAL, J.

This is an action in replevin brought by the plaintiff in error against Lorenzo Marr to recover the possession of a threshing machine, horse-power, and attachments. The property was taken under the writ, and the possession thereof delivered to the plaintiff. Before the trial, Jacob Marr intervened, claiming title to the property adverse to both the plaintiff and the defendant Lorenzo Marr. The case was tried to a jury, who returned a verdict in favor of Jacob Marr. The plaintiff's motion for a new trial was overruled, and judgment rendered on the verdict.

In 1888, the defendant Lorenzo Marr was engaged in the farm implement and machinery business at Culbertson, and was agent for the sale of J. I. Case Threshing Machine Company's implements and machines. B. Conway was in his employ as salesman and general clerk to assist in the business.

On August 8, 1888, said Lorenzo Marr, defendant, as agent for said J. I. Case Threshing Machine Company, sold to his son, Jacob Marr, co-defendant, and Henry Stein and George Hizenrater the threshing machine, horsepower, and attachments in controversy and took in payment three notes of \$226 each, due respectively December 1, 1888, December 1, 1889, and December 1, 1890. These notes were secured by a chattel mortgage on the machine, etc. Each note had a property statement on the back, that the makers thereof had property of the aggregate value of \$5,500, which property statement was given "For obtaining credit," as additional security for the payment of the notes.

Upon settlement of L. Marr with the J. I. Case Threshing Machine Company these notes were turned over to L. Marr in payment of his commission for this and other sales, who then assigned one-half interest in said notes to J. I. Case Plow Works to secure payment of his debt to it, and the other half interest in said notes he assigned to B. Conway for his services as clerk.

The machine was used during the season of 1888 and was then left uncleaned and exposed to the elements without cover or protection of any kind until April 13, 1889, when Conway took possession for the plaintiff under the chattel mortgage and left the property in care of L. Marr pending advertisement and sale. Afterwards L. Marr refused to surrender possession to the plaintiff, and this suit was then brought.

The note first falling due has been paid, and neither of the other notes had matured when action was commenced. The plaintiff claims the right to the possession of the property by virtue of the mortgage, under the following provisions therein :

"If any attempt shall be made to remove, dispose of, or injure said property, or any part thereof, by the said parties of the first part or any other person, or if the said parties

of the first part do not take proper care of said property, or if said party of the second part shall, at any time, deem itself insecure, then, thereupon, and thereafter it shall be lawful, and the said first parties hereby authorize the said second party, its successors and assigns, or its authorized agent, to treat the debt hereby secured as fully due and payable, and to take said property wherever the same may be found, and hold, or sell and dispose of the same, and all equity of redemption at public auction, or private sale," etc.

Counsel for plaintiff in error contends that the above provision in the mortgage vested in the plaintiff the absolute right to take possession of the property at any time, and that its authority so to do does not depend upon its having reasonable grounds for deeming itself insecure. Counsel cites a number of decisions from courts of last resort of learning and respectability to sustain his position. The question, however, is no longer an open one in this state. At the January term, 1888, in *Newlean v. Olson*, 22 Neb., 717, it was ruled that a provision in a chattel mortgage that "If the mortgagee shall at any time feel unsafe or insecure he may seize and sell," etc., does not authorize the mortgagee to arbitrarily seize and sell the property before the debt is due, but that the mortgagor must have done, or is about to do, some act which tends to impair the security to justify the mortgagee in taking such a step. The question was again before the court at the last term, in *Lichtenberger v. Johnson*, 32 Neb., 185, and the same rule was adhered to.

Was the plaintiff justified, under the evidence, in taking possession and selling the property? The proofs show that the machine was run one season by the mortgagors, and then left uncovered and exposed to the weather until taken possession of by the plaintiff in the spring of 1889; that one of the mortgagors, George Hizenrater, abandoned the machine in the fall of 1888, and left the country; that

Jacob Marr, another of the mortgagors, in April, 1889, sold his farm and made a bill of sale of his personal property, and went to Colorado; that Henry Stein, the remaining mortgagor, requested the agent of the plaintiff to take the property and sell it under the mortgage, which request was complied with, and the property was sold, the plaintiff being the purchaser.

B. Conway, the agent of the plaintiff, testified that the defendant Jacob Marr told him the machine was a curse to him from the time he got it; that he was going to go away and leave the machine, and that the witness might do as he pleased with it.

It is also stipulated that Nathaniel Hewitt, if present, would testify that Jacob Marr had said to him that he had relinquished all title and interest in and to the property to the plaintiff herein, and that he was going to Colorado to stay.

Jacob Marr denies under oath of making the above statement to Conway and Hewitt, and testified that he only went to Colorado to work.

We are satisfied that the plaintiff was justified in taking the property under the mortgage and selling it. The leaving of the property exposed to the weather for months depreciated the security, and was a violation of the provisions of the mortgage. There is no dispute but that Hizenrater, one of the makers of the notes, had left the country, and that Mr. Stein, another of the mortgagors, authorized the plaintiff to do just what was done. The plaintiff acted in the best of faith. He bid in the property for \$60, and afterwards sold it for \$500. This last amount is applied upon the notes. The verdict of the jury is unsupported by the evidence.

The defendant Jacob Marr claims that, upon the face of the pleadings, the issues stand admitted in his favor. The petition alleges ownership and right of possession of the property in the plaintiff at the commencement of the action,

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and that the same is wrongfully detained by the defendant. Jacob Marr answered denying the averments of the petition, and then sets up ownership in himself, and that the plaintiff had wrongfully taken possession of the property. No reply was necessary, besides the case was tried by both parties in a manner entirely inconsistent with the theory that one was necessary. There was no variance between the allegations of the petition and the proofs as to the ownership of the property.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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ART ELIZA ALEXANDER, APPELLANT, v. T. C. MEADVILLE ET AL., APPELLEES.

[FILED OCTOBER 14, 1891.]

Adverse Possession: TAX LIENS. Where a person has been in the actual, open, exclusive, adverse possession of lands as owner for ten years he thereby acquires an absolute title in fee, free from the lien created by a tax deed on the property issued more than ten years prior to the commencement of the action to foreclose such tax deed. (*D'Gette v. Sheldon*, 27 Neb., 829; *Alexander v. Wilcox*, 30 Id., 793.)

APPEAL from the district court for Otoe county. Heard below before CHAPMAN, J.

C. W. Seymour, for appellant, cited: *McClure v. Laverder*, 21 Neb., 181; *Peet v. O'Brien*, 5 Id., 360; *Miller v. Hurford*, 11 Id., 384; *Merriam v. Otoe Co.*, 15 Id., 408; *Shelley v. Towle*, 16 Id., 194; *Bryant v. Estabrook*, Id., 217;

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Otoe Co. v. Brown, Id., 397; *Schoenheit v. Nelson*, Id., 235; *McClure v. Warner*, Id., 447; *Neb. City v. Gas Co.*, 9 Id., 347; *Holmes v. Andrews*, 16 Id., 298; *Smith v. Gibson*, 25 Id., 514; *Otoe Co. v. Mathews*, 18 Id., 466; *Merriam v. Hemple*, 17 Id., 345; *Lammers v. Comstock*, 20 Id., 341; *Merriam v. Dovey*, 25 Id., 618; *Sullivan v. Merriam*, 16 Id., 157; *Lepin v. Paine Co.*, 15 Id., 326; *Merriam v. Rauhen*, 23 Id., 219; *O'Donohue v. Hendrix*, 13 Id., 258; *Holmes v. Andrews*, 16 Id., 296; *Pettit v. Black*, 8 Id., 62; *Seaman v. Thompson*, 16 Id., 546; *State v. Babcock*, 17 Id., 195; *Haller v. Blaco*, 10 Id., 38; *Baldwin v. Merriam*, 16 Id., 200; *Howard v. Lamaster*, 11 Id., 584; *Kittle v. Shervin*, Id., 69; *Cowan v. State*, 22 Id., 525; *Towle v. Holt*, 14 Id., 227; *Price v. Lancaster Co.*, 18 Id., 198; *Tucker v. Whitteley*, 41 N. W. Rep. [Wis.], 535; *McGarock v. Pollack*, 13 Neb., 535; *Jones v. Duras*, 14 Id., 40.

M. L. Hayward, *contra*, cited: *Gatling v. Lane*, 17 Neb., 77; *Haywood v. Thomas*, Id., 237; *Tex v. Pflug*, 24 Id., 666; *Levy v. Yerga*, 25 Id., 764; *Hale v. Christy*, 8 Id., 264; *Merriam v. Dovey*, 25 Id., 622; *Brown v. Otoe Co.*, 18 Id., 360; *Merriam v. Hemple*, 17 Id., 346; *Dillon v. Merriam*, 22 Id., 151; *McGarock v. Pollack*, 13 Id., 536.

NORVAL, J.

This suit was brought by appellant on the 26th day of May, 1887, against Thomas C. Meadville and A. S. Cole to foreclose a tax lien on the east half of the northwest quarter of section 1, township 7, range 14, in Otoe county. The tax deed, upon which the plaintiff's action is based, bears date September 8, 1876, and was duly recorded on the 21st day of the same month. The petition avers that the treasurer's deed is invalid and sets up the amount of taxes paid on the land prior and subsequent to the date of the deed, aggregating \$177.04, for which sum with interest plaintiff claims a lien. The date of the last payment

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of taxes claimed by appellant was January 11, 1877, when the tax for the year 1876 was paid.

Meadville and Cole filed disclaimers. The defendant Withnall's answer denies all the allegations of the petition, and also alleges that he and his grantors have been in actual, open, continuous, exclusive possession of said land, as owners, for more than ten years prior to the commencement of this action.

Ceylon H. Lewis intervened, and set up a tax deed issued to him on the 8th day of October, 1883, covering a portion of said land, and praying a foreclosure of his lien.

On the trial of the cause the court found that the plaintiff's action was barred by the statute of limitation and dismissed the plaintiff's petition. The court also found that there was due Ceylon H. Lewis on this tax lien the sum of \$188.16, and a decree was entered in his favor foreclosing his lien.

Upon the trial in the lower court it was stipulated by the parties that the defendant, J. H. R. Withnall, and his grantors, have had actual, open, continuous possession of the land, as owners, since December, 1866. This suit was brought more than ten years after the date of the tax deed.

It is claimed that the rights of the plaintiff are cut off by the adverse possession of the defendant. The question thus presented is not a new one to this court.

The case of *D'Gette v. Sheldon*, 27 Neb., 829, was an action to foreclose a tax lien. The certificate of tax sale was issued more than ten years prior to the bringing of the action thereon. The defendant had been in open, exclusive, notorious, adverse possession of the premises over ten years. It was held that the action was barred.

The case of *Alexander v. Wilcox et al.*, 30 Neb., 793, was brought on the 7th day of August, 1888, to foreclose a tax deed issued July 11, 1870. The defense was ten years' adverse possession. It was ruled that the defendant acquired an absolute title to the land, free from the lien created by the tax deed.

Gallagher v. Giddings.

These cases are believed to be sound in principle, and are decisive of the case at bar.

No fault is found with that part of the decree which gives Mr. Lewis a lien for taxes paid. The judgment is

AFFIRMED.

THE other judges concur.

HUGH J. GALLAGHER V. EDWIN GIDDINGS.

[FILED OCTOBER 14, 1891.]

Mortgage: DEED ABSOLUTE IN FORM: REDEMPTION: DISMISSAL.

A deed, absolute in form, was given to secure the payment of money due from the maker to the grantee, and after maturity of the loan the grantor brought an action to redeem the lands from the equitable mortgage and for a reconveyance, in which a decree was entered that the land be reconveyed upon the payment, within a specified time, of the amount found due the grantee. The payment not having been made, subsequently the court dismissed the petition to redeem, but gave no right nor privilege to take further legal proceedings on the subject. *Held*, That the dismissal of the petition to redeem forever barred and foreclosed the equity of redemption of the parties to that action and their privies.

ERROR to the district court for Holt county. Tried below before HOPEWELL, J.

M. F. Harrington, for plaintiff in error, cited: *Hansen v. Berthelsen*, 19 Neb., 433; *Merriam v. Hyde*, 9 Id., 120; *Hughes v. Davis*, 40 Cal., 117; 1 Jones, Mortgages, 336, 339, 1108; *White v. Lucas*, 46 Ia., 319; *Cowing v. Rogers*, 34 Cal., 648; *Campbell v. Dearborn*, 109 Mass., 130; *Westlake v. Horton*, 85 Ill., 228; *McCarthy v. McCarthy*, 36 Conn., 177; *Kemper v. Campbell*, 44 O. St., 210;

33	222
38	184
33	222
46	849
33	222
47	716
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49	302
54	397
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59	188

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Woods v. Shields, 1 Neb., 453; *Renard v. Brown*, 7 Id., 454; *Kent's Com.*, 134; *Borrowscale v. Tuttle*, 5 Allen [Mass.], 377; *Perine v. Dunn*, 4 Johns. Ch. [N. Y.], 142; *Bishop v. Paine*, 11 Ves. [Eng.], 199; *Cholmley v. Countess*, 2 Atk. [Eng.], 267; *Footte v. Gibbs*, 1 Gray [Mass.], 413; *Durant v. Essex Co.*, 7 Wall. [U. S.], 107; *Wells, Res. Adjudicata*, sec. 455; *Freeman, Judgments*, sec. 270; *Sch. Dist. v. Brown*, 10 Neb., 441; *Baird v. Kirtland*, 8 O., 21; *Buchan v. Sumner*, 2 Barb. Ch. [N. Y.], 199.

G. M. Cleveland, contra, cited: *Kyger v. Ryley*, 2 Neb., 27; *Gregory v. Hartley*, 6 Id., 356; *Hansen v. Berthelsen*, 19 Id., 433; *Merriam v. Hyde*, 9 Id., 120; *Neafie v. Neafie*, 11 Am. Dec. [N. Y.], 380; *Loudenback v. Collins*, 4 O. St., 251; *Smith v. Auld*, 1 Pac. Rep. [Kan.], 626; *Taylor v. Larkin*, 49 Am. Dec. [Mo.], 119; *Smith v. McNeal*, 109 U. S., 426; *McMillan v. Richards*, 9 Cal., 365; *Goodenow v. Ewer*, 16 Id., 461; *Green v. Fisk*, 103 U. S., 519; *Colcord v. Fletcher*, 50 Me., 401.

NORVAL, J.

This was an action in ejectment brought by the plaintiff in error in the district court of Holt county. The defendants interposed a general demurrer to the petition, which was sustained, and the plaintiff elected to stand upon his petition, whereupon the court dismissed the action and adjudged costs against the plaintiff.

The petition alleges, in effect, that on the 22d day of April, 1885, the defendants Edwin Giddings and one Cyrus D. B. Eiseman, being the owners in fee simple of lot 16 in block 17, in the city of O'Neill, conveyed the same by warranty deed to E. F. Gallagher; that Lydia Giddings, the wife of said Edwin, joined in said conveyance, and the deed was on the same day duly recorded in the office of the county clerk of Holt county; that on the 6th day of August, 1885, while Giddings and Eiseman were

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in possession of the premises, said E. F. Gallagher, by warranty deed, conveyed the premises to the plaintiff, Hugh J. Gallagher, which deed was on the same day duly recorded; that on the 11th day of August, 1885, said Edwin Giddings and Cyrus D. B. Eiseman commenced an action in the district court of Holt county against E. F. Gallagher and Hugh J. Gallagher to have the deed given by Giddings and Eiseman to E. F. Gallagher declared to be a mortgage, and praying that they be allowed to redeem said premises therefrom; that on the 2d day of September, 1886, the district court found that the said deed of conveyance, signed by said Eiseman and Edwin and Lydia Giddings, was given as a mortgage to secure the payment of a note of \$900, which note was given for \$795.05, money borrowed at a usurious rate of interest, and entered a decree that the said Cyrus D. B. Eiseman and Edwin Giddings pay to the said E. F. Gallagher the said sum so found due, or pay that amount into court for him within ten days; that said Gallagher, within twenty days from the date of the said decree, convey said premises to said Eiseman and Giddings by a good and sufficient deed, and in default thereof, that the decree should operate as a conveyance, and that the title to said premises be quieted and confirmed in said Eiseman and Giddings, upon their paying to said E. F. Gallagher the said sum of \$795.05. A copy of the pleadings and decree in said action is set out in the petition filed in this cause.

The petition also avers that an appeal was taken from said decree to the supreme court, and at the January, 1888, term thereof the said decree of the district court was modified so as to require the plaintiffs to pay interest upon the amount of the loan, from the date thereof, at the rate of seven per cent per annum, and the cause was remanded to the district court with directions to allow interest as aforesaid.

The petition further alleges that by agreement of the parties to said suit the cause was again submitted to the

supreme court for the purpose of having a final judgment and decree entered in said court, and at the July, 1888, term thereof, a decree was entered therein, in words and figures as follows :

"EDWIN GIDDINGS AND C. D. B. EISEMAN,	}
Plaintiffs and Appellees,	
v.	
E. F. GALLAGHER AND HUGH J. GALLAGHER,	}
Defendants and Appellants.	

"This cause coming on for hearing upon the motion of the plaintiffs to retax cos's and the stipulation of the parties to have the final decree entered in this court, and the court, being fully advised in the premises, does find that the deed of conveyance described in plaintiffs' petition in the original action, signed by C. D. B. Eiseman, Edwin Giddings, and Lydia Giddings, transferring lot No. 16 (sixteen), block 17 (seventeen), in the village of O'Neill and state of Nebraska, as the same appears of record in the office of the county clerk of Holt county, Nebraska, to E. F. Gallagher, was given as a mortgage to secure the payment of a note for \$900, which note was given for borrowed money, which the said C. D. B. Eiseman and Edwin Giddings borrowed from the said E. F. Gallagher, and that the plaintiffs herein are indebted to the said E. F. Gallagher on said note in the sum of \$795.05, and that the balance of the \$900 for which said note was given, and which said deed was given to secure, was usurious interest, and that the deed of conveyance described in said petition signed by E. F. Gallagher, conveying the lot above described to Hugh J. Gallagher, was fraudulent and void, and that the said Hugh J. Gallagher had notice of the fact that said deed from C. D. B. Eiseman, Edwin Giddings, and Lydia Giddings to E. F. Gallagher was intended between the parties thereto as a mortgage and was given for the purpose of securing said loan of money as aforesaid, and that the same was never recorded as required by law.

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"It is therefore ordered, adjudged, and decreed that the plaintiffs herein, Cyrus D. B. Eiseman and Edwin Giddings, pay to the defendant E. F. Gallagher the sum of \$795.05, and \$200.26 interest thereon, and interest thereon at the rate of seven per cent from the date of this decree, or pay that amount into court for him within ninety days from the date of this decree, and that said E. F. Gallagher do, within twenty days from the payment of said amount as aforesaid, convey the premises as aforesaid to the said C. D. B. Eiseman and Edwin Giddings by a good and sufficient deed with covenants of warranty against his own acts, and in default thereof, that this judgment have the operation and effect of such deed; that the deed signed by E. F. Gallagher, conveying the above described premises to Hugh J. Gallagher, be, and the same hereby is, canceled and forever annulled and set aside; that the title to said premises be, and the same hereby is, quieted and confirmed in and to the said C. D. B. Eiseman and Edwin Giddings; that the cloud upon said premises be, and the same is hereby, forever cleared from the same; that the said Hugh J. Gallagher, and all persons claiming through or from him, be forever foreclosed from setting up or in any manner claiming title to or any interest in said premises through, or by virtue of the said deed from E. F. Gallagher to Hugh J. Gallagher, upon the plaintiff herein paying, within ninety days, the sum of \$795.05 and \$200.26 interest thereon, and interest at the rate of seven per cent on said amounts from the date of this decree, and that the defendants pay the costs of the district court taxed at \$——, and one-third of the costs of this court taxed at \$47.15. And in case said plaintiffs neglect or refuse to pay the said sum of money within ninety days, as aforesaid, their petition filed in the district court of Holt county in this case be dismissed and that the plaintiffs pay all costs in both courts."

The petition further avers that said Cyrus D. B. Eise-

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man and Edwin Giddings failed to pay said sums of money so decreed by the supreme court, within ninety days from the date of said decree, that the same is still unpaid; that at the October, 1889, term of the district court of Holt county, this plaintiff and said E. F. Gallagher filed in said court a motion to dismiss said action for non-compliance with the said final decree, which motion was submitted to said court, upon the consideration whereof the court sustained said motion and dismissed said action.

The petition further alleges that said Eiseman has sold and conveyed his interest in said premises to the defendant herein, who keeps the plaintiff out of the possession thereof.

The question presented for consideration is, Did the dismissal of the petition to redeem, filed by Eiseman and Giddings in their suit against Hugh J. Gallagher and E. F. Gallagher, quiet the title to the premises in controversy in the plaintiff herein? The warranty deed of April 22, 1885, executed by Giddings and wife and Eiseman, although absolute in form, being given as security for a loan of money, in equity is regarded as a mortgage. Although the grantor E. F. Gallagher is considered only a mortgagee, the deed conveyed the legal title to the premises to him, and nothing remained in the grantors except the equity of redemption. This case is different from an ordinary mortgage, in which the title does not pass to the mortgagee, but remains in the mortgagor until foreclosure and sale. (*Baird v. Kirtland*, 8 O., 21; *Kemper v. Campbell*, 44 O. St., 210; *Hughes v. Davis*, 40 Cal., 117; 1 Jones on Mortgages, sec. 339.)

The deed from E. F. Gallagher to Hugh J. Gallagher conveyed the legal title to the land to the latter, but the right of redemption remained in the grantors of the deed of April 22, 1885, and they were entitled to a conveyance of the land upon the payment of the amount due on the loan. Had full payment been made, a reconveyance was indispensable to reclothe the grantors with the legal title

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to the premises, or a decree that they be reconveyed, and in default thereof, the decree have the effect of a conveyance. Eiseman and Giddings brought their action to redeem from the equitable mortgage and for a reconveyance, alleging in their petition that they were ready and willing to pay the debt, and a decree was entered that the land be reconveyed to them upon the payment, within a specified time, of the amount found due the grantee. The payment not having been made, subsequently the petition to redeem was dismissed by the court and the right or privilege to take further legal proceedings on the subject was not given by the decree.

In argument it is claimed by the defendant in error that the judgment of dismissal of the petition to redeem is not a bar to the equity of redemption. In ordinary mortgages the right of the mortgagor to redeem is cut off by foreclosure and sale. The legal title in such case being in the mortgagor, in order to divest him of his title there must be a foreclosure of the mortgage, a sale under the decree and deed to the purchaser at the sale. And when a deed, although absolute in form, is intended as a mortgage, the equity of redemption of the grantor may be barred by foreclosure proceedings. But the legal title in such an equitable mortgage being in the grantee, where the grantor brings an action to redeem the premises and his petition is dismissed, by reason of his default in making payments by the day set in the decree for redemption, and no privilege is given to bring another action, the grantor's right of redemption is thereby extinguished. It constitutes a complete bar to any further litigation of the same subject between the same parties and privies. (*Borrowscale v. Tuttle*, 5 Allen [Mass.], 377; *Perine v. Dunn*, 4 Johns. Ch. [N. Y.], 142; *Foot v. Gibbs*, 1 Gray, 413; *Stevens v. Miner*, 110 Mass., 59; 2 Hilliard on Mortgages, 43.)

It follows that the petition of Eiseman and Giddings to redeem having been dismissed for their failure to pay the

amount found due by the decree, they could not maintain another action to redeem. The judgment of dismissal barred and foreclosed their equity of redemption, and the relation of mortgagor and mortgagee no longer exist. The right of redemption being extinguished, the plaintiff cannot foreclose. If he has such a remedy, then the right of redemption has not ceased, for, as stated in *Renard v. Brown*, 7 Neb., 454, "The right of redemption is said to be a correspondent right to that of foreclosure."

But the defendant in error insists that the dismissal of the petition to redeem did not bar the equity of redemption of Lydia Giddings, the wife of the defendant, as she was not a party to said action. She not having been a party to the former litigation, it is obvious that her rights were not affected by the proceedings. Mrs. Giddings is not a party to this action, therefore it is not necessary to determine what her rights are.

The judgment of the district court, in sustaining the demurrer to the petition and dismissing this action, is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY
V. THOMAS HALL.

[FILED OCTOBER 21, 1891.]

- Verdict: SHOULD BE SET ASIDE, WHEN.** It is the duty of a jury to find its verdict in accordance with the law as given in the instructions of the court. When they clearly violate this duty, the court should set aside their verdict. The refusal of the court to do so upon proper application is reversible error. (See *Aultman v. Reams*, 9 Neb., 487; *Meyer v. M. P. R. Co.*, 2 Id., 342.)

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54	11
54	563
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56	131
56	572
33	229
59	589
33	229
52	574
62	665

2. ———: ———. A general verdict which is clearly inconsistent and in conflict with a special finding of fact submitted to the jury in the same case, should be set aside on motion.

ERROR to the district court of Gage county. Tried below before BROADY, J.

J. M. Thurston, W. R. Kelly, and J. S. Shropshire, for plaintiff in error, cited: *Secord v. R. Co.*, 18 Fed. Rep. [Minn.], 221; 3 Wood Ry. Law, p. 1505, sec. 392; *Robinson v. R. Co.*, 7 Gray [Mass.], 92; *Mad River R. Co. v. Barber*, 5 O. St., 568; *Summersell v. Fish*, 117 Mass., 312; Wharton, Negligence, [2d Ed.], sec. 237.

R. W. Sabin, R. S. Bibb, contra.

COBB, CH. J.

The plaintiff below, in his petition, alleges the incorporation of the defendant; that on the 4th day of February, 1889, he was in the employ of the defendant, and had been for a period of three years; that while in the employment of the defendant he performed the work assigned to him, but through no fault or negligence of his, one W. H. McLeary, who was also an employe of defendant, and was unloading coal from defendant's cars, carelessly and negligently threw a large and heavy lump of coal upon plaintiff's right hand, crushing the same, breaking the bones thereof, etc.; that during the period of his employment the defendant had retained twenty-five cents per month from his wages to create a fund for the purpose of paying its surgeons for surgical treatment of its employes who might receive personal injuries while in the service, etc.; that he was directed by the order of the defendant to report to the surgeon for treatment; that he submitted his hand to the examination and treatment of said surgeon; that the said surgeon thereupon set the bones and reduced the fracture, but did the same so carelessly, negligently,

and unskillfully that his hand has been crooked and out of joint, and the third and fourth fingers rendered useless, etc., whereby the plaintiff has been greatly injured and is unable to attend to his ordinary business, to his damage in the sum of \$3,000.

For answer to this, defendant below made a general denial to the allegations to the petition, and further, that the plaintiff paid the twenty-five cents charged upon his salary voluntarily, and that the same was used to defray the expenses of his treatment; that he was treated skillfully and carefully, and that the surgeon was a skillful and careful surgeon, and thoroughly competent to treat the injury; that the plaintiff was guilty of contributory negligence. As an additional defense, a settlement with the plaintiff for his damages was alleged, and a release signed by him, absolving the defendant from any liability whatever on account of his injuries, was alleged and shown.

This was replied to, thus forming the issues upon which the case was tried.

There was a verdict for the plaintiff for \$500.

A motion for a new trial was overruled, and judgment rendered on the verdict.

The defendant below alleges the following errors:

1. The court erred in admitting the reply to Q. 23, put to plaintiff.
2. Also to Q. 216, put to Dr. Wells.
3. Also to Q. 301, put to Cyrus Richardson; and in refusing to permit Cyrus Richardson to make answer to Q. 310.
4. In refusing to permit an answer to be made by Dr. Galbraith to Q. 693.
5. In overruling the offer of defendant to prove that Dr. Walden was a surgeon of ordinary skill and ability and was known to be such by each of the several witnesses.
6. In permitting the answers to be taken to Q. 988, 1019, 1027, 1043, as the same appear in the bill of exceptions.

7. In giving to the jury instruction No. 3, requested by the plaintiff.

8. In refusing to give instruction No. 1, requested by the defendant.

9. And instruction No. 3, requested by defendant.

10. And instruction No. 7, requested by defendant.

11. And instruction No. 8, requested by defendant.

12. And instruction No. 9, requested by defendant.

13. And in giving instruction No. 1, of its own motion.

14. And in giving instruction No. 3, of its own motion.

15. The verdict is contrary to law, to the evidence, and to the instructions of the court.

16. That the general verdict is contrary to law.

17. That the general verdict is not sustained by sufficient evidence.

18. That the general verdict is contrary to and not sustained by the special finding of the jury.

19. That under the verdict and the special finding returned by the jury the defendant was entitled to judgment, and the court erred in rendering judgment in favor of the plaintiff upon the general verdict.

20. Because the facts stated in plaintiff's petition are not sufficient to support a verdict in favor of the plaintiff under the special verdict returned herein.

21. Because the court erred in overruling the motion for a new trial.

Upon the trial the plaintiff testified that on or about the 4th day of February, 1889, he was in the employment of the defendant, and was engaged in building a wall; that at that time he had been in the employment of the defendant for about two years, getting \$1.55 per day, working every day, Sunday included; that his particular business was wiping, but did other work occasionally, or when called upon; that at the time above stated, the master mechanic and general foreman of the defendant company, who had charge of the line and under whose direction

plaintiff was working, wanted him to "kind of" superintend the piling of coal; that plaintiff "was simply building a wall and piling coal." Being requested to explain to the jury about the wall which he said he was building, and the coal which he was piling, said: "I suppose the ground between the railroad tracks and the pile is twenty-five feet, and we would run three cars on one side of that pile and then three cars on the other side, and unload so as to build it up even; I was doing the walling and building the wall; I knew that was pretty dangerous myself, and kept pretty close watch, and told them to watch all the time; I could not watch for them. I was standing between car and pile of coal; I was pulling a piece off the pile to lay on the wall, and a man by the name of McLeary slung a piece out and struck me on the hand. I had one hand on the piece of coal, and he threw a piece of coal out and broke this hand." Being requested to explain to the jury how, or to what extent his hand was injured, he answered, "Well, as near as I can tell you, the point of that hand lay literally mashed down, the piece of coal hit me and mashed this part down (illustrating). I happened to have on a pretty heavy mitten, or it would have been worse for me." The following question was then put to plaintiff:

Q. What injury did it do to your hand?

Objected to by defendant, as immaterial and inadmissible under the pleadings, which objection being overruled, he answered:

A. Well, as near as I can tell, the joint of this large finger is dislocated, also that one, and the smaller ones are broken.

He further testified that he knew that he had to go to a doctor; that he had to go to the office and get a ticket before he could go; that he had to go to Hayes for a ticket; that Beatty wrote him out a ticket to go to Dr. Walden; that he went up to the office and Dr. Walden was not in at the

time; that Mr. Bates was there and dressed his hand; that Dr. Walden afterwards told him that Bates would attend to it any time he was absent. To the question, "What was done with it?" he answered, "He took a long piece of cloth and commenced wrapping it, and wrapped it all around and put a little piece of cotton batting in my hand and told me to grasp that, and wrapped a piece of bandage around it and gave me a bottle of liniment. There was nothing said about the wrist at that time. I don't think there was anything at that time; I did not know myself there was anything but a broken finger." To the question, "When did you go to see Dr. Walden about it?" he answered, "I think I went the next day, and then he dressed it." He went to the doctor every other day; went eight days. Then he asked the doctor when he thought he would be able to go to work; that the doctor, after inquiring of him if his work was hard, and being informed that it was not, and that he could do the most of it—wiping with his left hand—and that he would like to go to work as soon as the doctor thought him able to work, gave him a note to Mr. Hayes, and Hayes told him (plaintiff) to go into the house and go to work; that he went to work and worked six days; that on the 19th he went to Dr. Walden's office in response to a note from the doctor; that the doctor then examined his hand, rebroke, reset, and rebandaged the hand; that he carried the hand in splints and bandage until the 19th or 20th of March, when the doctor took them off; that he had been unable to work since that time; had tried to work but his hand would get lame, so he had to stop; that his hand pained him a great deal, and at times he could not sleep nights; that he carried his arm in a sling a little over four weeks after his hand was reset; that he went back to work the last time under Dr. Walden's order; that he kept going back and forth every few days; that Dr. Walden was railroad physician, as plaintiff understood; that plaintiff is fifty five years old,

is a married man, has a family of four, all depending upon him but one; that he has no means of support other than his labor; that he is as strong and able to do a day's work as he ever was were it not for his hand.

Upon re-examination plaintiff testified that Mr. Hayes told him to pile that coal up; that plaintiff was working under his direction; that the man who threw the coal there was working by the day the same as plaintiff.

There was other evidence introduced and given on the part of the plaintiff, corroborating his own testimony as to the manner in which the injury was inflicted, and in some degree the extent of the injury.

The defendant introduced Dr. Edward Bates, who testified that he is a resident of Beatrice, where he had resided over five years; that he is a practicing physician; had practiced something over five years; knows the plaintiff; knows Dr. Walden; has known him eight or nine years. Whereupon the following question was put to the witness: "Q. Do you know what his reputation is in this community as a physician and surgeon?" which question was objected to by the plaintiff, as incompetent and immaterial, and objection was sustained.

Dr. A. Walden was sworn and examined as a witness on the part of the defendant. He testified that he resided in Beatrice, where he had resided and practiced as physician and surgeon for twelve years; has practiced as such altogether for nearly twenty-eight years; was graduated by Rush Medical College, of Chicago; that his profession included surgery as well as medicine; that he took charge of the plaintiff's hand three or four days after the injury. The witness then described the injury to plaintiff's hand and its treatment by Dr. Bates and by himself, and declared it to be the correct and proper treatment in such cases.

W. I. Galbraith, a witness on the part of the defendant, testified that he resides in Omaha; that he is a surgeon;

O. & R. V. R. Co. v. Hall.

had been practicing surgery for about twelve years; that he was acquainted with Dr. A. Walden, had known him for five or six years, and was familiar with his reputation as a physician and surgeon in Gage county. The following question was then put to witness: "Q. What is his reputation as to skill and competency as a physician and surgeon?" which question was objected to by the plaintiff, as incompetent and immaterial, and objection was sustained. Thereupon the defendant offered to prove by this witness that Dr. Walden, the physician and surgeon who treated the plaintiff, was a man of ordinary skill and competency as a physician and surgeon; that he is known to be such.

BY THE COURT: Do you allege they have claimed anything to the contrary?

MR. SHROPSHIRE: No, sir, I do not.

Objection sustained.

The court, upon its own motion, instructed the jury as follows:

"1. Plaintiff's action is based upon alleged negligence of defendant by which personal injury resulted to plaintiff, causing damage to plaintiff, for which plaintiff asks judgment. In order to find for the plaintiff you must find that defendant has been guilty of negligence or want of ordinary care and diligence as alleged in the petition.

"2. As to that part of the petition alleging that the surgeon of defendant did not as a surgeon properly treat the injury of the plaintiff, you are instructed that that allegation cannot be the basis of an action against defendant in this case in favor of plaintiff, because the petition does not allege that defendant failed to use due care and diligence in selecting a competent surgeon, or was guilty of any negligence in choosing a surgeon, or that the surgeon of the company did not possess the ordinary professional skill, learning, and qualifications for such position as surgeon of the company. Because the petition makes no such

avermert of negligence on the part of defendant, the plaintiff's objection to defendant's offer to prove the good professional reputation and standing of Dr. Walden was sustained because it was not in issue and was not in answer to plaintiff's case, nor any new matter set up in the answer. However, for the purpose of preserving the fact that it may, if found necessary, be still utilized, a special finding will be submitted for you to answer as to whether the surgeon properly treated the plaintiff's injury."

The following instructions were given by the court at the request of the defendant:

"No. 2. The court instructs the jury that before the plaintiff can recover in this action, he must show that the injury complained of was caused by the negligence of the defendant railroad company, and that if the plaintiff has failed to show the negligence upon the part of said defendant railroad company, then the plaintiff cannot recover in this action, and your verdict must be for the defendant.

"No. 4. The jury are instructed that when a person enters into the service of a railroad company, he thereby undertakes to run all the ordinary risks incident to the employment, including his own negligence or unskillfulness, and that of his fellow-servants who are engaged in the same line of duty, provided the company has taken reasonable care and precaution to engage competent servants to discharge the duties assigned to them.

"No. 6. The court further instructs the jury that if they believe from the evidence that the plaintiff, at the time he received the injuries complained of in his petition, was at said time an employe of the defendant, and received said injuries by reason of the negligence of another, who at the same time was a fellow employe, and engaged at the same employment with the plaintiff; and if you further believe from the evidence that such employment or service bore such relation to each other, that the careless or negligent

conduct of one of said employes may endanger the safety of the other, that then such danger is incident to their employment, and that if one be injured by the negligence of the other, no recovery can be had for the injury.

"No. 5. If the jury believe from the evidence that at the time of the accident in question the plaintiff was in the employ of the defendant as foreman, or in charge of a gang of men unloading coal from the cars, and while so employed and in the line of his duty he received an injury resulting from the negligence or want of ordinary care and skill of W. H. McGory, who was at the same time engaged with the plaintiff in unloading coal from the same cars, then the court instructs the jury as a matter of law that the plaintiff and W. H. McGory were fellow-servants, engaged in the same grade or line of service, within the meaning of the law, and the defendant, if otherwise without fault, would not be liable for such injury."

The defendant requested the court to give the following instruction, which was refused:

"No. 1. The court instructs the jury that, under the pleadings and the proofs in this case, the plaintiff is not entitled to recover, and you will find a verdict for the defendant."

There were other instructions given and refused, but which it is not deemed necessary to copy or to further refer to here.

The jury returned a verdict for the plaintiff and assessed his damages at the sum of \$500; also the following special finding: "Did Dr. Walden in his treatment of the plaintiff's injury, as a surgeon use ordinary care, skill, and diligence for such professional services? Answer. Yes."

If the petition states a cause of action against the defendant, it is either that the defendant was negligent in the act of McGavey (as he is called in the petition, but he is also called McGory in the instructions) in negligently throwing a lump of coal, striking and injuring the plaintiff.

iff's hand; or that the defendant was negligent in the act of its surgeon in the negligent and unskillful treatment of the said injury.

The fourth and sixth instructions given by the court at the request of the defendant, if followed by the jury, they could not find for the plaintiff upon the theory first above stated, upon the evidence in the case. It is not necessary to decide, nor do I, whether the law is correctly given in the said instructions. It is the duty of the jury in all cases to follow the instructions given them in charge by the court, and if they do not do so the verdict should be set aside and a new trial ordered. (See *Aultman v. Reams*, 9 Neb., 487; *Meyer v. M. P. R. Co.*, 2 Id., 342; *Jewett & Root v. Smart & Gillett*, 11 Ia., 505.)

In instruction No. 2, given by the court on its own motion, the jury were told that the allegations of the petition, that the surgeon of the defendant did not properly treat the injury of the plaintiff, cannot be the basis of an action against the defendant in this case in favor of the plaintiff, because the petition does not allege that the defendant failed to use due care and diligence in selecting a competent surgeon, etc.; but that for reasons then stated, it would submit a special finding to them as to whether the surgeon properly treated the plaintiff's injury. We have seen that special finding was submitted and found in the affirmative. Therefore, in addition to what has already been said, in speaking of the other supposed cause of action, if the verdict was based upon the negligence of the surgeon, it is not only contrary to the instructions, but also contrary to, and inconsistent with, the special finding of the jury.

The motion for a new trial should have been sustained.

The judgment of the district court is

REVERSED AND THE CAUSE REMANDED.

THE other judges concur.

GEORGE POMEROY V. WHITE LAKE LUMBER COMPANY.

[FILED JANUARY 28, 1890.*]

Mechanics' Liens: FORECLOSURE: PETITION: AMENDMENT.

In an action to foreclose a mechanic's lien for material furnished the contractor in the erection of a building, the petition was drawn as though the contract had been made with the owner of the building instead of the contractor. A general demurrer to the petition, on behalf of the owner, having been overruled, he then filed an answer, and the case was tried upon the merits, and judgment rendered against the owner for the value of the materials. *Held*, That while the petition was informal and defective in its statements as to the acts of the contractor, yet to be available, the party demurring should have stood upon his demurrer, and having answered and contested the case upon the merits, and the judgment apparently being right, the court, if necessary, will permit the petition to be amended to conform to the proof.

ERROR to the district court for Franklin county. Tried below before GASLIN, J.

G. R. Chaney (*C. E. Davis* with him), for plaintiff in error, cited: *Foster v. Dohle*, 17 Neb., 631; *Marrener v. Paxton*, Id., 634; *McCormick v. Lawton*, 3 Id., 449; *Meyers v. Le Poidevin*, 9 Id., 536; *Lawton v. Case*, 73 Ind., 60; *Simpson v. Dalrymple*, 11 Cush. [Mass.], 308; *Willard v. Magoon*, 30 Mich., 273; *Clark v. Schatz*, 24 Minn., 303; *Wilcox v. Kieth*, 3 Ore., 372; *Carey v. Wintersteen*, 60 Pa. St., 395; *Davis v. Alvord*, 94 U. S., 545; Phillips, *Mechanics' Liens* [2d Ed.], secs. 18, 338, 387, 403, 428.

J. L. Edwards, contra.

* Withheld, according to instructions, until determination of the cause on rehearing.

MAXWELL, J.

This is an action to foreclose a mechanic's lien, and on the trial of the cause judgment of foreclosure and sale was rendered.

A number of errors are assigned, which will be noticed in their order.

It is claimed that the petition is insufficient. It is as follows:

"The plaintiff is a corporation, duly organized as such under and by virtue of the laws of the state of Illinois, and its principal place of business is at Chicago, Illinois, and is doing business in the state of Nebraska. Plaintiff complains of the defendant for that on or about the 10th day of October, 1887, the plaintiff entered into a verbal contract with defendant, A. C. Winan, to furnish him lumber, windows, doors, lath, lime, hair, brick, and other materials for the erection of a dwelling house for defendant, George Pomeroy, on the following described real estate, to-wit: the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 30, town (1) one, range (13) thirteen, in Franklin county, Nebraska.

"In pursuance of said verbal contract the plaintiff furnished said materials to the said defendant A. C. Winan, for the erection of said house, on and between October 10, 1887, and December 23, 1887, for the sum of \$394.57 in the aggregate, an itemized bill of said materials and the prices of the same is hereto attached, marked 'Exhibit A,' and made a part of this petition.

"The defendant George Pomeroy, at the time the plaintiff furnished said materials as aforesaid, was the owner in fee of said real estate.

"On the 7th day of February, A. D. 1888, and within sixty days from the time of furnishing said materials, the plaintiff made an account in writing of the items of such materials furnished the defendant Winan, under said con-

Pomeroy v. White Lake Lumber Co.

tract, and after making oath thereto as required by law, filed the same in the clerk's office of Franklin county, Nebraska, and claiming a mechanic's lien therefor upon said real estate and said building thereon. The sum of \$293.97, with interest from December 22, 1887, and \$1 recording fee of said lien, now remain due and unpaid on said account."

In "Exhibit A," the account attached to the petition and made a part of it, A. C. Winan is described as "contractor for George Pomeroy." A general demurrer was filed by Pomeroy to the petition, which was overruled. Pomeroy then filed an answer denying the facts stated in the petition.

It will be observed that the petition is drawn as though Pomeroy was the party with whom the contract had been made, instead of the person for whom Winan was erecting the house, and had the plaintiff in error relied upon his demurrer and not filed an answer and contested the case upon the merits, it is probable that the petition standing alone would have been insufficient. The proof, however, clearly shows that Winan was a contractor and erected the house in dispute for Pomeroy, and that the material was furnished by the defendant in error for the erection of said building, and that the judgment is not excessive. Such being the case, we would, if necessary, permit an amendment of the petition in this court in conformity to the proof, but such amendment will not be required unless insisted upon by the plaintiff in error, and will be without costs. The judgment is conformable to the proof and justice of the case, and is

AFFIRMED.

THE other judges concur.

SAME V. SAME.

33 243
40 461

[FILED OCTOBER 21, 1891.]

1. **Mechanics' Liens: FORECLOSURE: PETITION LIBERALLY CONSTRUED.** In an action by a material-man to foreclose a mechanic's lien it was alleged that "in pursuance of said verbal contract the plaintiff furnished said material to the said defendant A. C. Winan for the erection of said house on and between October 10, 1887, and December 23, 1887, for the sum of \$394.57, in the aggregate." *Held*, That, construing the allegations of the petition liberally, it was to be inferred that the materials so furnished were used in the construction of the building.
2. ———: **FOUNDATION OF THE RIGHT.** The right of a material-man to a lien upon a building, does not result from the contractor being an agent of the owner, but from having furnished such contractor materials which were used in the erection of the building.

REHEARING of preceding case.

M. B. Reese, and *G. R. Chaney*, for plaintiff in error, cited: *Curtis v. Outler*, 7 Neb., 315; *Catron v. Shepherd*, 8 Id., 308; *Ball v. La Clair*, 17 Id., 39; *O'Donohue v. Hendrix*, 13 Id., 255; *Tingley v. Dolby*, Id., 371.

J. L. Edwards, *contra*, cited: *Rathburn v. R. Co.*, 16 Neb., 441; *Bell v. Sherer*, 12 Id., 409; *Foster v. Dohle*, 17 Id., 631; Phillips, *Mechanics' Liens*, p. 23, sec. 13; *Griggs v. Le Poidevin*, 11 Neb., 385; *Schukraft v. Ruck*, 6 Daly [N. Y.], 1; *Freeman v. Carson*, 27 Minn., 516; *Steigleman v. McBride*, 17 Ill., 300; *McLaughlin v. Green*, 48 Miss., 175; *Gaty v. Casey*, 15 Ill., 189; *Chapin v. Persse*, 30 Conn., 461.

MAXWELL, J.

An opinion was filed in this case January 28, 1890, affirming the judgment of the court below. Afterwards

a motion for a rehearing was filed, and the court, fearing that a mistake had been made, granted a rehearing. A copy of the petition is set forth in the former opinion, and need not be repeated here.

The case has been carefully re-examined, and we are convinced that the former opinion is right.

Section 2, chapter 54, Comp. Stats., provides, "Any person or subcontractor who shall perform any labor for, or furnish any material or machinery or fixtures for, any of the purposes mentioned in the first section of this act, to the contractor or any subcontractor who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement of the amount due him or them from such contractor or subcontractor for such labor or material, machinery or fixtures, together with a description of the land upon which the same were done or used, within sixty days from the performing of such labor or furnishing such material, machinery, or fixtures, with the register of deeds of the county wherein said land is situated, and if the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due for such labor or material, machinery, and fixtures, on such lot or lots and the improvements thereon, from the same time and in the same manner as such original contractor, and the risk of all payments made to the original contractor shall be upon the owner until the expiration of the sixty days hereinbefore specified. And no owner shall be liable to any action by the contractor until the expiration of said sixty days, and such owner may pay such subcontractor or person the amount due him from such contractor for such labor and material, machinery and fixtures, and the amount so paid shall be held and deemed a payment of such amount to the original contractor. And in cases where a dispute arises between the contractor and his journeyman, or other persons, for work done or material furnished, the owner may retain the amount claimed by

said subcontractor or journeyman or laborer until the dispute has been settled by arbitration or otherwise. Said sworn statement and claim of lien shall be by such register of deeds recorded in the same manner as other liens provided for by this chapter, and such lien shall remain in force for the same length of time as other liens provided for in this chapter."

It will be observed that it is alleged in the petition that the plaintiff "furnished said material to the said defendant A. C. Winan for the erection of said house on and between October 10, 1887, and December 23, 1887, for the sum of \$394.57 in the aggregate." It is also alleged that on the 7th of February, 1888, the necessary steps were taken to perfect a mechanic's lien. It is not directly alleged that the material so furnished was used in the erection of the building. It is to be inferred, however, that it was so used. The meaning of the word "furnish," as defined by Webster, is "to fit up with anything needful." In effect, the allegation is that the defendant in error supplied the material set forth in the exhibit attached to the petition, in the erection of the house, and that it was so used. And the proof is clear that it was used in the erection of said building. But it is said that it is not alleged that Winan was the agent of Pomeroy, and, therefore, that he could not bind him by purchasing materials. The answer to this is that the lien of a material-man is not derived from the relation of agency between the contractor for the erection of the building and the owner, but from the fact the materials, or a portion of those used in the erection thereof, were furnished by him and used therein, and hence to the extent of the value of such materials he has contributed to the erection of the building. The law, therefore, gives him a lien upon the building, provided he takes the necessary steps to secure the same within sixty days. That appears to have been done in this case.

Some objection is made to the description of the land,

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but no issue of this kind is tendered, and it will not be discussed. The petition is not a model by any means, but its provisions, if liberally construed as required by the Code, will support the judgment. The judgment of the court below is right and the former judgment is

ADHERED TO.

THE other judges concur.

W. T. BULL v. J. P. WAGNER.

[FILED OCTOBER 21, 1891.]

1. **Instructions: REVIEW.** There being a conflict of testimony upon material points in the case, the testimony was properly submitted to the jury, and the verdict is supported by the weight of evidence.
2. ———. Where the court had given full instructions upon the issues involved in the case, it is not error to refuse to give additional instructions.

ERROR to the district court for Gage county. Tried below before CHAPMAN, J.

Hazlett & Bates, for plaintiff in error.

R. S. Bibb, *contra*.

MAXWELL, J.

This action was brought in the court below to recover upon an account as follows:

"*Wakely T. Bull, Trustee, Dixon, Ill. Racine, Wis.*

"BEATRICE, NEB., 1-21-1886.

"Please deliver to the undersigned on board cars in Dixon, Ill., on or about March 1, 1886, the following goods of your manufacture which I have purchased, and do hereby purchase of you, viz.:

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LEFT	RIGHT
HAND.	HAND.

10 B. No. 1 S. B. plows.

10 Duplex, 3 Sec. 72-tooth harrows, @ 10.50.

2 Duplex, 2 Sec. 72-tooth harrows, @ 10.50."

(In red ink:) "Terms of warranty indorsed. Five per cent cash disc. Cash July 1, 1886, Lincoln freight. For the above — will pay you prices noted below, giving you on receipt of goods — in notes as follows: Payable in Chicago Exchange, or by express prepaid. Discount from list, 45 per cent. One-half Dec. 15, '86; one-half Jan. 15, '87. Net price, 10.50; 10 per cent interest on notes past due. Name, J. P. Wagner; shipped via U. P."

The defendant filed an answer as follows:

"He denies that the plaintiff ever delivered to him, or that he ever received from the plaintiff, the '10 B. No. 1 S. B. plows' or the '2 Duplex 2 Sec. 72-T. Harrows, 10½,' alleged by plaintiff in his petition herein filed.

"He admits that plaintiff delivered to him and that he received from said plaintiff the '10 Duplex 3 Sec. 72-T. Harrows 10½,' and the 'A. C. No. 3 share,' as alleged in said petition, but defendant says that said goods, wares, and merchandise, are fully settled for, and that defendant is not indebted to the plaintiff therefor in any sum whatever.

"And this defendant for further defense in the way of offset and counter-claim, says: That plaintiff is indebted to this defendant in the sum of \$19.40 for one plow sent by the defendant to the plaintiff for repairs, which the plaintiff agreed to repair, and which said plow plaintiff converted to his own use, to defendant's damage in the sum of \$19.40.

"That said plaintiff is indebted to this defendant for seven cultivators of the value of \$126, which said cultivators the plaintiff, upon the 13th day of June, A. D.

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1885, agreed to receive and credit to this defendant in the fall of 1885, which said seven cultivators have been duly returned to the plaintiff by defendant, but which said credit has never been given defendant by plaintiff as agreed, and in which said sum for said cultivators, to-wit, \$126, the plaintiff became, was, and still is indebted to this defendant, to defendant's further damage in the further sum of \$126."

On the trial of the cause the jury returned a verdict in favor of the defendant for the sum of \$53.83, upon which judgment was rendered.

Two grounds are assigned for the reversal of the judgment: First, that the verdict is against the weight of evidence, and, second, that the court erred in refusing to give certain instructions.

One of the principal questions involved was whether the plaintiff in this case and the Orvis Plow Company were in fact one and the same person, so that a contract made with one of them, as the plaintiff, would bind the company. Upon this point the evidence is conflicting and was proper to submit to a jury. The explanation of Mr. Orvis as to the relations of the plaintiff and himself to the plow company during the time the transactions in controversy were taking place, are not very satisfactory, and, in our view, the jury were fully justified in finding, as they must have done, that the plaintiff and plow company represented the same person.

2. Objections are made to the refusal of the court to give certain instructions asked. The court on its own motion had given full instructions upon all the points involved in the case, and there was no error in refusing to give additional instructions.

There is no error apparent in the record and the judgment is

AFFIRMED.

THE other judges concur.

HUNTER & MCARTHUR V. T. N. BELL ET AL.

83	249
86	198
86	211

[FILED OCTOBER 21, 1891.]

1. **Review:** AFFIDAVITS used in support of a motion for a new trial must be preserved in a bill of exceptions to be available in the supreme court.
2. ———. In an action containing four counts for feeding fat steers, the evidence upon almost every point was conflicting, and it not appearing that the judgment was wrong it will be upheld.

ERROR to the district court for Valley county. Tried below before TIFFANY, J.

E. M. Coffin, and *Westover & Stone*, for plaintiffs in error, cited: *Brewer v. Wright*, 25 Neb., 305.

Robbins & Babcock, *J. N. Paul*, and *Darnall & Babcock*, *contra*.

MAXWELL, J.

This action was brought in the district court of Valley county by the defendants in error, against the plaintiffs in error, to recover the sum of \$6,387.74, upon three causes of action as follows:

"The plaintiff, Theron N. Bell, complains of the defendants, Hunter & McArthur, a partnership but not incorporated, constituted of R. Hunter and D. A. McArthur, for that said defendants on or about the 3d day of November, A. D. 1885, entered into a contract in writing with said T. N. Bell, a true copy of said written contract is hereunto attached marked 'Exhibit A' and made a part of this petition, wherein it was agreed that said defendants should deliver to said plaintiff sixty head of cattle, all steers. To be fed full feed of corn from March 1, 1886, to October 1, 1886, said cattle, before weighing to said Bell, to stand off from feed for twelve hours at the stock yards

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at St. Paul, Nebraska, which said steers when so weighed in the aggregate 38,370 pounds. That said Bell should use due diligence in taking care of said cattle, and to deliver the said cattle back to said Hunter & McArthur at the scales, and before weighing to stand off from feed and water for twelve hours unless otherwise agreed upon, but that said defendants Hunter & McArthur should have the option to take said cattle at any time after August 1, 1886, and before the time of final delivery named in said contract, October 1, 1886, by giving said T. N. Bell six days' notice of such intention.

"II. In consideration of the covenants aforesaid defendants, by the terms of the contract, agreed to pay said T. N. Bell six and one-fourth cents per pound for all flesh put on said sixty head of cattle over and above said 38,370 pounds and said plaintiff received from said defendants said cattle as agreed in said contract, and that plaintiff did feed said sixty head of cattle full feed of corn and did duly perform each and every part of his said contract, and that he took said cattle from feed twelve hours (except one which had died, weight 639 pounds) before weighing the same, and that said fifty-nine head of cattle weighed in the aggregate 67,405 pounds, said weight being a net gain of 29,754 pounds of flesh put on by said plaintiff while in his care, for which said net gain said plaintiff, in pursuance of the terms of said contract, becomes entitled to receive six and one-fourth cents per pound, in the aggregate the sum of eighteen hundred and fifty-nine dollars and sixty-two cents.

"III. That on the 1st day of October, A. D. 1886, defendants failed, refused, and neglected to receive said cattle as they had contracted and agreed, and that said plaintiff weighed said cattle after their being twelve hours from their feed as aforesaid, except one which had died, and that said plaintiff was entitled to receive from the defendants \$1,859.62 and the same is due and wholly unpaid.

"SECOND CAUSE OF ACTION.

"And plaintiff for a second cause of action alleges that on or about the 1st day of October, 1886, by reason of the neglect and refusal of said defendants to receive said cattle from said plaintiff as they were bound to do by the terms of their contract, said plaintiff entered into an oral agreement with defendants by the terms of which it was agreed that said plaintiff should keep said fifty-nine head of cattle until December 1, 1886, upon the terms and conditions that said defendants were to receive the same at that time clear of further expense to said defendants, and upon failure of said defendants to take said fifty-nine head of cattle at the time last aforesaid mentioned said defendants were to pay said plaintiff for any time said cattle remained in his care after the said 1st day of December, A. D. 1886, what such keeping and feeding was reasonably worth.

"II. That under said oral agreement said plaintiff kept said cattle until on or about the 13th day of August, 1887, during all of which time plaintiff fed and cared for said cattle, furnishing corn, hay, and pasture in its season.

"III. That the keeping and feeding of said cattle was reasonably worth \$1,470; that said sum is due and unpaid, or any part thereof, though defendants have often been requested to pay same.

"THIRD CAUSE OF ACTION.

"Plaintiff complains that on the 13th day of November, A. D. 1886, said plaintiff and defendants entered into another written contract, a copy of which is hereunto attached marked 'Ex. B,' and made a part of this petition. By the terms of said contract it was agreed that said defendants would deliver the plaintiff 263 head of steers to be fed on full feed of corn from November 15, 1886, and it was agreed that defendants would receive 209 of said cattle on the 1st day of July, 1887, and that they would

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receive the remainder, fifty-four head, on the 1st day of October, 1887, the defendants reserving the right to take said 209 head after June 1st, 1887, and said fifty-four head August 1st, 1887, and the agreed weight, by the terms of said contract, of said cattle was 326,610 pounds.

"II. And it was agreed that defendants would pay plaintiff six cents per pound for all flesh put on said cattle, and plaintiff says he received said cattle under said contract, and that prior and subsequent to the time defendants were to receive them six of said cattle died, leaving in the possession of plaintiff 257; that plaintiff kept and performed each and every part of his said contract, but defendant failed, refused, and neglected to receive said cattle at the times covenanted in their said contract, and plaintiff avers that he kept said 257 head of cattle on full feed of corn up to the 25th day of July, A. D. 1887, and that plaintiff urged defendants to comply with their said contract and receive said cattle, but defendants, disregarding their covenants, still refused, neglected, and failed so to do.

"III. That on and after July 25, 1887, he was unable to procure all the corn that it was necessary to feed said cattle, and that he so notified defendants and urged them to take said cattle; that defendants still refused, and that by reason of defendants' refusing to take said cattle, and by reason of plaintiff being unable to procure corn after defendants' time for taking said cattle had passed, said cattle were not half fed for a period of forty days, when defendants, still being urged, did receive 141 head of said cattle, the same weighing 216,860, an average of 1,538 pounds; and that several days thereafter defendants, without the consent and against the objection of plaintiff, removed the remaining 116 head of cattle without weighing them, but that said 116 head of cattle were as good cattle and equal in all respects to the 141 head, and that 116 head of cattle would, in the aggregate, weigh 178,408 pounds.

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"IV. That he put in flesh on said cattle 26,329 pounds, for which he should have received from defendants \$4,566.12, and that the same is due and unpaid, except defendants paid two notes amounting in all to \$3,190.

"V. That by reason of defendants having failed and refused to receive their said cattle on the 1st of July, 1887, and 1st of October, 1887, said cattle shrunk in weight 150 pounds each, and by reason of defendants' violating their said contract in not receiving said cattle as they had agreed, it caused great loss to the plaintiff in the sum of \$1,500.

"FOURTH CAUSE OF ACTION.

"That on or about the 1st day of December, A. D. 1888, defendants and plaintiff entered into a verbal agreement, the terms of which were that the plaintiff should receive certain cattle, known as the Little cattle, upon the same terms and conditions as the 263 head aforesaid; that plaintiff received them and duly performed all of his part of said contract and put a net gain of 3,035 pounds, for which plaintiff is entitled to receive six cents per pound, or \$182, all of which is due and unpaid, though defendant has often been requested to pay the same."

To this petition the defendant below on the trial filed an amended answer as follows:

"The defendants for answer to the plaintiff's petition deny each and every allegation therein contained except such as are expressly admitted herein. Defendants admit that they contracted with the plaintiff to furnish certain cattle for plaintiff to feed and care for same, said contracts being expressed in writing and subscribed by plaintiff, and defendants' copies of said contracts are attached to the plaintiff's petition and made a part thereof; that in pursuance of said contracts the plaintiff did feed and care for said cattle for and during the time mentioned in his petition, and it was expressly understood and agreed between the plaintiff and defendants that the plaintiff was not to

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have nor receive any extra compensation therefor other than what was agreed upon in said written contracts; that the plaintiff at the expiration of the times mentioned in said written contracts agreed with the defendants to continue to feed said cattle until such times as the defendants desired to receive them and take them away; and that the said written contracts were to be and continue to cover all of the time said cattle were so fed and cared for by said plaintiff, and that the same terms and conditions were to apply thereto.

"Defendants admit that plaintiff fed and cared for the 'Little' cattle, as set forth in the fourth count of his petition, and upon the terms and conditions as set forth therein; that in pursuance of the terms of said contracts, the plaintiff and defendants weighed and caused to be weighed said cattle so fed and cared for by the plaintiff, and by such weighing it was ascertained that the flesh put on said cattle by said plaintiff as per said contracts was as follows: 32,851 pounds, for which the defendants agreed to pay the plaintiff six and one-fourth cents per pound, amounting to the sum of \$2,053.18; 68,890 pounds, for which the defendants agreed to pay the plaintiff six cents per pound, amounting to the sum of \$4,133.40, and 335 pounds (Little cattle), for which defendants agreed to pay the plaintiff six cents per pound, amounting to the sum of \$182.10; amounting in the aggregate to the sum of \$6,368.68.

"That prior to the commencement of this action, to-wit, on or about the 1st day of December, 1886, the plaintiff assigned the subject-matter of this action, and all rights, title, and interest therein, to one A. G. Kendall, who then became and ever since has been the owner thereof; that before the commencement of this action they, the said defendants, satisfied the above named claim of \$6,368.68 by payment to the said A. G. Kendall, assignee, and Theron N. Bell before said contracts were signed and after the same were signed by and with the consent of A. G. Kendall;

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that the plaintiff, Theron N. Bell, is at present time, and was at the time of the commencement of this action, indebted to the defendants in the sum of \$12,600.56, being for money had and received by said Theron N. Bell from the defendants for his own use and benefit, and \$69 being for the defendants' share of the profits of three car loads of hogs, which the plaintiff received and converted to his own use, and did not pay these defendants as he was required by terms of his contract before that time was made to do, which agreement was made and said money received during the years 1886 and 1887.

"The defendants further allege, as a separate defense, that on or about the — day of October, 1887, the plaintiff and these defendants had a full and complete settlement of all matters and differences between them, save and except two items mentioned in this answer as composing the sum of \$126, and on the date of said settlement, and under the terms thereof, defendants then and there paid to the plaintiff the sum of \$1,000, it then and there being agreed by the plaintiff and these defendants there still remained due the plaintiff, under the contract for keeping the said cattle, the sum of \$61.84, which, in pursuance of said settlement, the defendants were to pay to the plaintiff within a few days, and the defendants allege that within said few days, to-wit, on the — day of November, 1887, they paid said sum of \$61.84, as shown by said check to the plaintiff, in full satisfaction of all claims and liabilities against these defendants under the contracts and agreements for the keeping of said cattle; that said sums of \$1,000 and \$61.84 were at once paid over to said A. G. Kendall by said Theron N. Bell.

"The defendants therefore pray that they may recover judgment against the plaintiff herein in the sum of \$126, upon the said cause of action so alleged, which was not included in said settlement, and their costs herein expended, and that the defendants, so far as the plaintiff's cause of action relates, go hence without date."

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The court, at the defendant's request, made special findings, as follows :

"Now comes the defendants, before judgment and before the court has made a finding in the case, and prays the court to make special finding separately of the facts and the law in the case, and to make a special finding of facts upon the following questions:

"Q. On or about November 3, 1886, in Grand Island, Nebraska, did the plaintiff, Theron N. Bell, make an agreement with the defendants, Hunter & McArthur, by the terms of which he was to keep the sixty head of cattle which he had prior to that time held under contract with said defendants for a period beginning October 1 and ending December 1, 1886, without charge to the defendants?

"Yes.

"Q. Did the plaintiff, Theron N. Bell, at Grand Island, Nebraska, on or about November 3, 1886, make an oral agreement with the defendants by the terms of which he was to keep said sixty head of cattle from October 1, 1886, upon the same conditions which he had prior to that time been keeping them, until such time as defendants should take away the 263 head of cattle, which the said plaintiff then had and was about to contract with the defendants to keep, which head he did about that time contract in writing to keep?

"No.

"Q. Did the plaintiff, Theron N. Bell, on or about May 13, 1887, change the terms of the written contract which he had, on or about November 13, 1886, made with the defendants for the keeping of 263 head of cattle, by agreement to place the same in a pasture? And if so, did that agreement affect also the fifty-three head of cattle then remaining from the lot referred to as the sixty head?

"Yes.

"Q. Did the defendants agree to pay the plaintiff for keeping the 209 head beyond and after July 1, 1887?

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And if they did, was the plaintiff to be paid by the number of pounds added to the cattle, or a reasonable consideration for keeping the same?

"Reasonable consideration.

"Q. Was there a shrinkage upon all of the cattle, or any portion of them, caused by their being left over a time and the plaintiff not having corn to feed them? If so, how much?

"Yes; forty pounds.

"Q. Did the defendants pay any portion of the money which they paid to the plaintiff, unauthorized or in violation of the rights of the St. Paul National Bank? If so, how much?

"No.

"Q. How much money has been paid by the defendants upon the contracts for the keeping of all the cattle referred to?

"Six thousand four hundred and ninety-four dollars and sixty-eight cents.

"Q. Did the plaintiff and the defendants, on or about October, 1887, have a settlement of all their differences, if any there had prior to that time existed, in regard to the keeping of the cattle referred to?

"No final settlement.

"Q. If you find that at the settlement in October, 1887, there was \$61.84 due the plaintiff from the defendants, then find whether or not that sum so agreed upon had been paid or not.

"Was paid."

The defendants also requested the court to make a special finding of the law applicable to this case upon the following propositions:

"Q. Is not the claim of damages made by the plaintiff by reason of a shrinkage in the cattle caused by not having corn to feed them, too remote and speculative and not a subject to be recovered upon in this case?

"No.

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"Q. As a matter of law, was it not a duty of the plaintiff to go into the market and buy corn at whatever price it could be obtained, and feed the cattle, charging the defendants whatever price he had to pay? If you find the fact to be that the defendants were to pay him a reasonable price, or whatever it was worth, to keep the cattle beyond July, 1887, or whether they were paying him by the amount of flesh put on under either the written or oral contract.

"Was his duty to make reasonable effort to obtain it.

"Q. As a matter of law, find if the contracts that were made with Bell by the defendants had been assigned to the St. Paul National Bank, was it still not a duty and the legal right of the defendants to settle the amount and determine the amount due upon said contracts with the plaintiff, provided the payments went to the St. Paul National Bank?

"Yes.

"Q. As a matter of law, if the St. Paul National Bank, by its officers, had knowledge that there was an oral agreement between the plaintiff and the defendants, extending, changing, or modifying the written contracts, would not said St. Paul National Bank be bound by such extensions, changes, or modifications, provided they did not object to such changes and accepted money paid on such extended, changed, or modified contracts, after knowledge of the same?

"Yes."

The court rendered judgment for the defendants in error for the sum of \$2,098.64.

The first ground of error in the motion for a new trial is, in substance, that the court erred in receiving evidence of cattle-feeders out of court to show that the 260 head would shrink in weight during the time Bell was unable to procure corn to feed them.

In support of this contention, an affidavit of one of Mr.

Bell's attorneys is attached to the motion for a new trial, in which it is stated that the judge, in rendering judgment, had said that he had inquired of experienced stockmen of his acquaintance to find out whether or not cattle situated as those were would shrink or not, and that from all the testimony he had concluded that the cattle would shrink forty pounds each during this time, and that he would allow the plaintiff that sum as damages. The affidavit, however, is not authenticated in any manner, nor is there anything before us to show that it was used on the hearing of the motion for a new trial. It therefore cannot be considered.

Second—Error of the court in finding that there was no final settlement of the parties in October, 1887.

Third—That the judgment is contrary to the tenth finding of fact.

Fourth—That the judgment is against the weight of evidence.

Fifth—That the judgment is contrary to law.

Sixth—That there is no evidence upon which the court could find for the plaintiff and against the defendants.

Seventh—That there is no evidence to justify the ninth finding of fact.

Eighth—That the judgment is contrary to the special findings of facts.

There are also a number of assignments of errors of law which need not be noticed.

It will be observed that the ninth finding of fact is, that there was no final settlement between the parties in October, 1887.

The questions involved in this case are questions of fact, and upon almost every point the evidence is conflicting. It is not seriously contended that the judgment is against the weight of evidence, and there seems to be no material error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

J. A. PAYNE ET AL. V. L. R. JONES ET AL.

[FILED OCTOBER 21, 1891.]

1. **Bills of Exceptions: EXTENDING TIME FOR FILING.** The Code authorizes the court to grant forty days from the final adjournment of the court in which to prepare a bill of exceptions. If this time is insufficient, the court, or a judge thereof, may extend the time in which to prepare such bill an additional forty days. If the judge before whom the cause was tried is absent from his district, another judge of the same district where there are two or more, may make an order extending the time.
2. ———: ———. Where the orders extending the time do not exceed eighty days from the adjournment of the court *sine die*, this court will not review the action of the judge in extending the time.
3. ———: **AFFIDAVITS** used on a hearing in the district court must be preserved in a bill of exceptions to be available in the supreme court.
4. **Review.** There being no material error in the proceedings, the judgment is affirmed.

ERROR to the district court for Custer county. Tried below before HAMER, J.

H. M. Sullivan, Kirkpatrick & Holcomb, O. P. Mason, and Samuel J. Tuttle, for plaintiffs in error.

R. A. Moore, M. McSherry, and Judson C. Porter, contra, cited: *McCarn v. Cooley*, 30 Neb., 552; *Olds Wagon Co. v. Benedict*, 27 Id., 344; *Seward v. Klenk*, Id., 615; *Edwards v. Carney*, 13 Id., 502; *McCarn v. Cooley*, 30 Id., 552; *Schaffroneck v. Martin*, 9 Id., 39; *Jefferson Co. v. Saxon*, 10 Id., 15; *Birdsall v. Carter*, 16 Id., 422; *Jordan v. Flinn*, 17 Id., 518.

MAXWELL, J.

This action was brought by the defendants in error against the plaintiffs in error in the district court of Cus-

ter county, to recover for the conversion of a stock of goods and destruction of business.

On the trial of the cause the jury returned a verdict in favor of the defendants in error for the sum of \$2,800. A motion for a new trial was thereupon filed and overruled, and judgment entered on the verdict.

A motion is now made to quash the bill of exceptions, because it was not submitted to the attorneys for the defendants in error within forty days after the adjournment of the court.

The trial took place before Judge Hamer, and he appears to have been absent from his district when an extension of time was sought, hence application was made to Judge Church, who extended the time ten days, within which the bill was prepared and submitted to the attorneys of the adverse party.

It is claimed that Judge Church had no authority thus to extend the time, and that his action in the premises was void. We think differently however. The statute authorizes a court to grant forty days from the time of final adjournment for parties to prepare bills of exceptions and submit them to the adverse parties. As it is frequently impossible to prepare bills in forty days, the statute authorizes a judge, upon a showing satisfactory to him, to extend the time an additional forty days in which to prepare the bill. This is a remedial statute, and is to be liberally construed in favor of justice. A judge is thus given power to extend the time in all to eighty days in which to prepare a bill of exceptions, and the reasons which induced him to extend such time are not open to collateral inquiry. Motions of this kind are not to be encouraged, and probably the ends of justice would be subserved if the court, in all cases, would refuse to quash a bill of exceptions when duly signed by the proper officer; but, however this may be, there is no solid ground for the motion in this case, and it is overruled.

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2. A motion is also made to strike certain affidavits from the files. These purport to have been used in the court below, but are not preserved in the bill of exceptions. This motion must be sustained.

In a very large number of cases this court has held that evidence of any kind used on a hearing in the court below, to be available in this court, must be preserved in a bill of exceptions, otherwise there would be no assurance that such evidence had been so used and the court would be liable to be imposed upon.

3. The action is based on a breach of the following contract:

"Whereas L. R. Jones and Neils Anderson, doing business under the firm name of Jones & Anderson, having executed to the People's Bank (J. A. Payne) their notes for \$4,000, dated April 6, 1889; one for \$1,326.47, due May 6, 1889; one for \$1,336.77, due June 6, 1889; and one for \$1,336.77, due July 6, 1889; and to secure the same have executed a real estate mortgage on a certain farm in Buffalo county owned by L. R. Jones and on lots 1 and 2, block 3, in Mason City, Custer county, Nebraska, and have also executed a chattel mortgage on their entire stock of goods in Mason City, Nebraska, consisting of all kinds of goods in their stock, the possession of the same is this day turned over to the said J. A. Payne; and whereas the said J. A. Payne has already advanced the sum of \$1,326.47 on said mortgage and are to advance the balance of said \$4,000 at such times and in such amounts as may hereafter be agreed upon as the said Jones & Anderson may need it to liquidate their indebtedness, and the said Payne is to take possession of said stock of goods and sell the same at ordinary retail trade and account for all the money so taken in, until the said \$4,000 is fully paid, and to keep the said stock replenished with what staples are necessary to keep up said stock, the said Jones & Anderson to donate their time in assist-

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ing to dispose of said stock ; but it is understood and agreed that they are to have no control of the possession, but the entire business is to be turned over to the said J. A. Payne, and all invoices to be received by and he places H. J. Cook in possession, who is to act as the agent of said Payne and be under his control.

“ L. R. JONES AND NEILS ANDERSON,

“ J. F. BALDWIN,

“Cashier People’s Bank.

“Mason City, Neb., April 10, 1889.”

The plaintiffs in error seem to have taken possession under said agreement at the time of the date thereof and continued in possession until about July 13 of that year, when they seem to have discharged Cook and excluded the defendants in error from the business, and thereafter sold the goods under a mortgage. The reason given by the plaintiff in error Payne, as set forth in his answer, is as follows: “That on or about April 6, 1889, the plaintiffs were largely indebted for merchandise previously purchased, to-wit, in the sum of about \$4,000, which amount was due and payable and were without money or other means to meet said indebtedness, and being pressed for payment thereof came to this defendant and desired him to assume said indebtedness and to pay the same, and thereupon this defendant took from said plaintiffs, and to pay the same, the said notes and mortgage in plaintiff’s petition mentioned and at the same time advanced to said plaintiffs the said sum of \$1,326.47, which was applied on said indebtedness and assumed the remainder of said indebtedness then owing by the plaintiffs to the amount of \$3,060, which defendant has since paid ; that at the same time the plaintiffs and this defendant entered into a verbal agreement to the effect that this defendant was to immediately take possession of said stock of goods embraced in said mortgage, and to sell the stock therein mentioned in the ordinary course of retail trade for cash, the proceeds to be

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applied first to pay the indebtedness created by the purchase of the necessary staples to replenish said stock and the balance, if any, to be applied on the notes hereinbefore mentioned given by the plaintiffs, the said plaintiffs to assist in the carrying on of said trade and sales, and defendant was to keep said stock replenished with the necessary staples, and by the terms and intent of said contract, if the amount derived from the sale of said stock should, at the time of maturity of said notes, equal the indebtedness contracted by purchasing said staples, and the amount of the indebtedness as evidenced by said notes given by the plaintiffs, then, and in that event, defendant was to turn back to the plaintiffs the said stock remaining unsold and fixtures, otherwise the said stock of goods to be disposed of under and by virtue of said chattel mortgage and according to the terms therein contained; and the said defendant alleges that in pursuance of said agreement he took possession of said stock of goods on April 6, 1889, and proceeded to sell the same at retail trade, according to the terms of said agreement, and during said time purchased staples for the purpose of replenishing said stock, under the terms of said agreement, in all to the amount of \$4,924.09; and the said defendant further alleges that while the plaintiffs were assisting in the sale of said goods, and on or about the 14th day of July, 1889, and for some time prior thereto, they fraudulently, and with intent to cheat and defraud this defendant, refused to turn over and account to him the amount of daily sales received by them while assisting in the sale of said goods, and fraudulently destroyed the account of said sales so made by them, and secretly and fraudulently removed from said store, without the knowledge or consent of this defendant, a large amount of the goods conveyed by said mortgage, and converted the same to their own use, and also converted to their own use the money received by them in their daily sales, as aforesaid, and that at the date of the maturity of said notes the amount of money derived from the sale of said

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goods was insufficient to pay the bills for the said staples so purchased as aforesaid, and no part of said notes having been paid, but default having been made therein, this defendant proceeded to advertise and sell said stock, as by the terms of said mortgage and agreement made and provided, which sale was on September 25, 1889, and from which sale was realized the sum of \$2,305; that on or about April 16, 1889, by a special agreement between plaintiffs and this defendant, clothing to the amount of \$1,955 was sold out of said stock by this defendant and notes taken therefor which have since been paid; that the amount realized from the retail sale of said goods is the sum of \$5,115.20, and that the total amount realized from all sources is the sum of \$9,375; that this defendant has advanced to said plaintiffs and paid out on their indebtedness owing at the time said mortgage was given the sum of \$4,381, and has paid for staple goods purchased to replenish said stock the sum of \$4,924.09, and has paid for expenses in carrying on said business and advertising and selling said stock of goods the sum of \$951.37; the total amount paid out by this defendant is the sum of \$10,257.09; that there is now due to this defendant from said plaintiff the sum of \$878.09, with interest from April 6, 1889, at the rate of ten per cent per annum, and interest on the remainder of the principal of said notes until paid by sales of property."

This answer was the principal issue in the case.

The proof clearly shows that on July 14 of that year the plaintiffs in error took possession of the stock of goods and sold the same, and after paying certain obligations converted the property to their own use. The questions involved seem to have been fairly submitted to the jury and substantial justice done.

It is unnecessary to review the instructions at length. The judgment is

AFFIRMED.

THE other judges concur.

STATE, EX REL. JAMES M. EASTERLING, v. R. M.
RANKIN.

38	266
160	276
33	266
62	463

[FILED OCTOBER 21, 1891.]

1. **Offices: VACANCIES: CONSTRUCTION OF STATUTES.** Where a law creating an office specifically provides how vacancies occurring in such office shall be filled, such provision, and not the general law on the subject of vacancies, governs and controls the method of filling vacancies in such office.
2. **County Attorney: VACANCY.** Where a vacancy occurs in the office of county attorney, it is the duty of the county board to fill the same by appointment, and the appointee will hold his office until a successor is elected and qualified.
3. **—: ELECTION.** A county attorney can only be elected at a general election held in even numbered years.

ORIGINAL application for *mandamus*.

James M. Easterling, for relator.

George H. Hastings, Attorney General, and *Ira D. Marston*, *contra*.

NORVAL, J.

This is an application for a peremptory writ of *mandamus* against the county clerk of Buffalo county to require him to include in the notices of election the office of county attorney to be voted for at the general election to be held in November, 1891, and to place upon the official ballot, to be voted for at such election, the name of the relator as a candidate for said office.

At the general election held in said county in November, 1890, one James E. Gallispie was elected to the office of county attorney of said county, who filed his official bond, took the oath of office required by law, entered upon the discharge of the duties of his office, and continued to dis-

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charge the same until March 4, 1891, at which time he died, and the office became vacant. On the 16th day of March, 1891, one Ira D. Marston was duly appointed to fill the vacancy, filed his official bond, took the oath of office, and thereupon entered upon and is now discharging the duties of said office.

At a convention of the people's independent party, held in said county on the 12th day of August, 1891, the relator was nominated as a candidate for the office of county attorney, to be voted for at the next general election to be held in said county, to fill the unexpired term of the said James E. Gallispie. The certificate of nomination of the relator for said office has been filed in the office of the county clerk of said county. The respondent refused to include in the notices of election the office of county attorney and refused to place the name of the relator as a candidate for said office on the official ballot.

It is claimed by the respondent that there is no vacancy in the office to which the relator seeks to be elected to be filled at the ensuing election.

Section 15, chapter 7, Compiled Statutes, provides "That at the general election in 1886, and every two years thereafter, a county attorney shall be elected in each organized county for judicial purposes, who shall hold the office for the term of two years and until his successor is elected and qualified," etc.

Section 25 of the same chapter provides that "In case of vacancy in the office of county attorney by death, resignation, or otherwise, the county board shall appoint a county attorney, who shall give bond, and take the same oath and perform the same duties as the regular county attorney, and shall hold said office until his successor shall be elected and qualified."

The above sections are the only provisions contained in the act of the legislature creating the office of county attorney, which prescribes the term of office and the method

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of filling the same. If they alone govern and control the filling of vacancies in such office, it is obvious that no election can be held to fill the office of county attorney of Buffalo county until the general election in November, 1892, for section 25 provides that a person appointed to fill a vacancy in said office shall hold the same "until his successor shall be elected and qualified," and section 15 only provides for the election of county attorneys in the even numbered years. There is no provision in the county attorney act which refers to the filling of vacancies by election.

The relator insists that the case is governed by the general law on the subject of filling vacancies in public offices by election. Section 107 of chapter 26, Compiled Statutes, entitled "Elections," provides that "Vacancies occurring in any state, judicial district, county, precinct, township, or any public elective office, thirty days prior to any general election, shall be filled thereat," etc.

This being a general provision, applies to all vacancies in public office, except where the legislature has otherwise specially provided. The section as now existing became a law in 1883, at which time the office of county attorney did not exist. The county attorney act was passed in 1885. It is a separate and distinct law, providing the term of such officer, when he shall be elected, his duties, and the manner of filling vacancies therein. It declares, in plain and unambiguous language, that the person appointed to fill a vacancy in such office "shall hold said office until his successor shall be elected and qualified." Had the legislature intended that the provisions of section 107, quoted above, should apply to vacancies in the office of county attorney the legislature would have made no provision in the law creating the office for filling vacancies therein. The law-makers having specially provided the method of filling vacancies in said office, the only conclusion we can reach is that it is exclusive of all others.

A similar question was before the court in *State, ex rel. Hull, v. Walker*, 30 Neb., 501. Hull was appointed by the county board of Sioux county to the office of county attorney to fill a vacancy. His appointment was made by entering the fact upon the official records of the county board. Subsequently, after a change in the membership of said board, Walker was appointed, his appointment being in writing, signed by the members of the county board and filed with the county clerk, in accordance with the provisions of section 105 of chapter 26, Compiled Statutes. It was held that Hull's appointment was valid, and that section 105 did not apply to the office of county attorney. In the opinion it is stated that "Section 105 is limited in its application to filling vacancies in the offices mentioned in said chapter 26, and does not, in any way, control the manner of filling vacancies in the office of county attorney. The legislature having, by a separate act, expressly provided for the filling of vacancies in the office of county attorney, the general law on the subject of vacancies does not apply to that officer."

The cases of *State, ex rel. Francl, v. Dodson*, 21 Neb., 218, and *State, ex rel. Cooper, v. Hamilton*, 29 Id., 198, cited in brief of relator, do not conflict with the position we have here taken. In the first case it was decided that the provisions of section 107, which we have been considering, applied to vacancies in the office of clerk of the district court, and that a vacancy occurring in such office thirty days prior to any general election could be filled thereat. There is no special law on the subject of filling vacancies in that office, and for that reason it was rightly held that the general provision controlled.

The other case was a contest over the office of councilman of the city of Lincoln. A vacancy occurred in the office of councilman of one of the wards of the city the day prior to the annual city election. The question was whether it could be legally filled at such election. The

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charter of the city provides for filling vacancies at general election, but does not provide how long prior to the general election a vacancy must occur in order to be filled thereat. It was ruled that as there was no special provision, the general law controlled.

We are all of the opinion that no election can be held to fill the office of county attorney except in the even numbered years, and that the relator is not entitled to have his name placed upon the official ballot to be voted at the coming election. The writ is

DENIED.

THE other judges concur.

33 270/
40 877/

A. T. GAMBLE V. JOHN WILSON ET AL.

[FILED OCTOBER 21, 1891.]

1. **Negotiable Instruments: TRANSFER CARRIES SECURITY.**

The transfer of a promissory note by indorsement operates as an assignment or transfer of a bill of sale given to secure its payment, and the owner of the note, in a proper case, may bring replevin in his own name to recover possession of the property covered by the bill of sale.

2. **Instructions: ERROR WITHOUT PREJUDICE.** A judgment will not be reversed for error committed in refusing an instruction, unless such error was prejudicial to the party complaining.

3. **Replevin: PROPERTY IN HANDS OF SHERIFF: DAMAGES.**

Where property is replevied from a sheriff holding it under an attachment, the measure of the officer's damages, in case of a verdict in his favor, is the amount due on the writ with interest and costs, if the value of the property is equal to or greater than the amount of the writ.

4. ———: ———: **PROOF OF VALUE.** When, in an action of replevin, the plaintiff admits on the record the value of the defendants' possession, it will not be necessary to prove the general

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value of the property, as it will be presumed that such value is equal to or exceeds the amount admitted by the plaintiff as the value of the defendants' special interest.

5. ———: ———: RIGHT OF POSSESSION: BURDEN OF PROOF. An attachment on a claim before due can only issue in the exceptional cases mentioned in the statute, and where property is replevied from a sheriff holding it under a writ of attachment issued on a debt not due, it devolves upon the officer to prove that the jurisdictional steps preceding the issuing of the writ have been taken, in order to have the amount of such claim included in the assessment of his damages.

ERROR to the district court for Buffalo county. Tried below before CHURCH, J.

Calkins & Pratt, for plaintiff in error, cited, as to the effect of the transfer: *Jones, Chat. Mortgages*, sec. 503; *Ramsdell v. Tewksbury*, 73 Me., 197; *Crain v. Pain*, 4 Cush. [Mass.], 483. As to measure of damages: *Kerr v. Drew*, 90 Mo., 147, and cases; *Booth v. Ableman*, 20 Wis., 21; *Seaman v. Luce*, 23 Barb. [N. Y.], 240; *McNorton v. Akers*, 24 Ia., 370.

Connor & Woodruff, contra, cited: *Mundy v. Whittemore*, 15 Neb., 649.

NORVAL, J.

One F. Morningstar, who was conducting a banking business under the name of the Farmers & Merchants Bank, at Sartoria, in Buffalo county, borrowed of A. T. Gamble, plaintiff in error, the sum of \$1,700 on the 17th day of December, 1887, and executed and delivered his promissory note for that amount, and secured the same by a bill of sale in writing of the property in controversy, consisting of a frame bank building, lumber office, fire and burglar proof safe, bank counter and fixtures. At some date between the 11th and 13th days of March, 1888, Morningstar disappeared, leaving one Taggart in posses-

sion of the premises, where he remained until between 10 o'clock and noon on the 14th, when Mr. Taggart shut up the building and went to Kearney, where the plaintiff resided, and, it is alleged, delivered to his agent the keys of the building and combination of the safe.

On the 15th day of March defendant Bannon procured an attachment to be issued out of the county court against the property of the Farmers & Merchants Bank of Sartoria, by virtue of which the defendant Wilson, as sheriff, on the 15th day of March, 1884, at 10 o'clock P. M., levied upon the safe and office furniture, being a part of the property mentioned in the said bill of sale, finding no one in visible possession. The plaintiff, claiming the property by virtue of the bill of sale and delivery of the key and the combination of the safe, brought the action of replevin in the court below and the property was accordingly taken and delivered to him.

The attachment was upon certificates of deposit, amounting altogether to the sum of \$249.10, only \$134 of which was due at the time of commencing said action. No proof was made of the value of the property taken, but it was admitted that the value of defendants' possession, if they were entitled as a matter of law to include the amount of the certificate of deposit which was not due at commencement of action, was \$249.10, but if the defendants were not entitled as a matter of law to include the amount of the certificate not due, then the value of the possession, should they be entitled to recover, was the sum of \$134. It also appears that the note which the bill of sale was given to secure had, before the commencement of the suit, been transferred to the Buffalo County National Bank, and that the plaintiff was not the owner of the note, but the bill of sale was not assigned.

The jury found the right of possession in defendants and that the value of their possession was \$249.10.

Complaint is made in the brief of counsel for plaintiff

in error to the giving to the jury the defendants' request No. 3. By it the court charged the jury, in effect, that if they found that prior to the bringing of the suit the plaintiff had transferred all his interest in the note, for which the bill of sale was given as security, to the Buffalo County National Bank, and that the bank was, at the commencement of the action, the owner of the same, then the plaintiff could not recover. The charge of the court was not only correct as an abstract proposition of law, but it was applicable in the case made by the evidence. It was undisputed that prior to the bringing of the suit the plaintiff transferred the note, which was secured by bill of sale, to the Buffalo County National Bank. The indorsement of the note was an assignment to the bank of the bill of sale and all of the plaintiff's interest therein. The bank could have maintained replevin of the property in its own name and was the real party in interest. (Herman on Chattel Mortgages, 415; *Mundy v. Whittemore*, 15 Neb., 647; *Studebaker Mfg. Co. v. McCargur*, 20 Id., 500; *Harman v. Barhydt*, Id., 625.)

But it was urged that as the property had been taken under the writ of replevin and delivered to the plaintiff, the court, in case a verdict was returned for the defendants, should render a judgment against the plaintiff for the value of the special interest, and it could not determine the controversy without prejudice to the rights of the bank, and therefore the court should have made the bank a party instead of instructing the jury to find for the defendants in case they found that the note had been transferred by the plaintiff. No doubt the bank had the right, under sections 47 and 50a of the Code, to intervene and assert its interest in the property in litigation, but it made no application of that kind. So, under section 46 of the Code, the court could have ordered the bank brought in, but we are unable to perceive upon what principle the plaintiff can be heard to complain that the rights and interest of the bank were

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not protected. A party cannot bring a suit, and after the case is decided against him, complain because the court did not of its own motion, before judgment, bring in some other party, who, under the evidence, might have maintained the action, to champion the plaintiff's failing cause.

It is claimed that the court erred in refusing the plaintiff's second request, which was: "The property claimed by defendant in this action is the safe and bank furniture, and if you find that the parties theretofore in possession of such safe and fixtures abandoned the same and delivered the key of the room in which such furniture was, together with the combination of such safe, to the plaintiff on the 14th day of March, 1888, such fact would constitute a sufficient taking of possession by plaintiff." The bill of sale had not been placed upon record at the time the attachment was levied. The theory of the plaintiff was that he had taken possession of the property before it was attached. The safe and furniture were left by Morningstar in the bank building in charge of one Taggart, who, on the 14th day of March, delivered a key to the building and the combination of the safe to Ross Gamble, the agent of the plaintiff. No one was in visible possession of the building, or property therein, when the sheriff levied the attachment. The bill of sale also covered the bank building. In view of this fact, and the nature of the property, we are of the opinion that the delivery of the key of the building and the combination of the safe constituted a delivery of possession to the plaintiff.

While the request states the proposition of law correctly, the refusal to give it to the jury was error without prejudice, for, as we have already seen, the plaintiff having transferred the bill of sale to the bank he had no such interest in the property as would authorize him to maintain replevin therefor. A judgment will not be reversed for refusing an instruction, unless such refusal was prejudicial to the rights of the complaining party.

It is finally claimed that there was no evidence to sustain the finding of the jury as to the value of the defendants' possession. Where property is replevied from a sheriff holding it by virtue of a levy under an execution or attachment, the measure of the officer's damages, in case of a verdict in his favor, is, within the value of the property, the amount due upon the writ, with interest and costs. (*Kersenbrock v. Martin*, 12 Neb., 374; *Welton v. Beltezore*, 17 Id., 399; *Cruts v. Wray*, 19 Id., 581.)

Ordinarily it is incumbent upon the officer to prove the value of the property; but when the plaintiff admits on the record the value of the defendants' possession, and no evidence is given as to the general value of the property, it will be presumed that such value is equal to or exceeds the amount admitted by the plaintiff as the value of the defendants' special interest. We are of the opinion that the defendants were not entitled to have included in the assessment of their damages, the amount of their certificate of deposit, which was not due at the commencement of the attachment proceedings.

Section 237 of the Code authorizes a creditor to maintain an action on a claim before it is due, and have an attachment against a debtor's property, on certain grounds specified in the section.

Section 238 requires that before the action shall be brought or the attachment granted, that "the plaintiff, his agent or attorney, shall make an oath in writing, showing the nature and amount of the plaintiff's claim, that it is just, when the same shall become due, and the existence of some one of the grounds for attachment enumerated in the preceding section."

Section 241 provides that before the order of attachment shall be issued, a plaintiff must enter into an undertaking, as directed by section 200.

The record fails to show that the affidavit and bond were filed. As an attachment on a claim before due can only

Hughes v. Swartz.

issue in the exceptional cases mentioned in the statute, it devolved upon the defendants to prove that the requirements of the law were complied with in order to have included the amount of the certificate of deposit, which was not due when the attachment was issued. To the amount of such certificate the damages were excessive.

Unless the defendants file with the clerk of this court within thirty days a remittitur of all the damages excepting \$134, as of the date of the judgment in the court below, the judgment will be reversed and remanded, but in case such a remittitur is filed, the judgment will stand

AFFIRMED.

THE other judges concur.

A. T. D. HUGHES v. H. M. SWARTZ.

[FILED OCTOBER 21, 1891.]

Debtor and Creditor: CLAIMS ASSUMED BY THIRD PARTY: COMPROMISE WITH CREDITORS. S. was engaged in the mercantile business, and being largely indebted to wholesale houses for his stock of goods, sold out his business to W. & H., who gave their three promissory notes as part of the purchase price. In order to secure the payment of the amounts due the creditors of S., by agreement of all the parties, including W. & H., the notes were placed in a bank at Auburn as trustee, with a list of the creditors and the amount due each, with instructions to use so much of the money paid to the bank on the notes as was necessary to pay the creditors of S. Subsequently H., without the knowledge of S., compromised with the wholesale men by discounting their claims. In an action by S. on two of the notes it was *held*, that H. was entitled to be credited only with the amounts actually paid by him in settlement of the claims.

ERROR to the district court for Nemaha county. Tried below before APPELGET, J.

Stull & Edwards, for plaintiff in error.

E. W. Thomas, and *G. W. Cornell*, *contra*.

NORVAL, J.

On the 27th day of April, 1885, the defendant in error was engaged in the mercantile business at Howe, in Nemaha county, and was indebted to a number of wholesale houses for his stock of goods. On said date he sold the business to the plaintiff in error Amos T. D. Hughes and one Edward S. Wykert, who continued the business under the firm name of Wykert & Hughes for a time, when the firm dissolved by Wykert retiring.

At the time of the sale of the stock of goods, and as a part of the purchase price, Wykert & Hughes executed their three promissory notes to Swartz, two for \$500 each, due respectively in one and two years from date, and the other for \$1,000, due in four years, all bearing interest at the rate of eight per cent per annum. At the time of the purchase and execution of these notes, Swartz informed the purchasers of the names of the wholesale merchants to whom he was indebted for the stock, the amount due each, and stated that he wished to arrange for the payment of said creditors. In order to secure the payment of the amounts due the several creditors of Swartz the three notes were, by agreement of all the parties, deposited with the bank at Auburn, as trustee, with instructions to the bank to use so much of the money when paid on the notes as would be necessary to pay the creditors of Swartz, a list of his creditors, with the amount due each, being at the time furnished to the bank. Subsequently Hughes, without the knowledge of Swartz, compromised with all the wholesale men by discounting all their claims against the defendant in error, for the payment of which the three notes given by Wykert & Hughes

Hughes v. Swartz.

were held by the bank as collateral security, and took an assignment of the claims to himself.

This action was brought in the court below by the defendant in error against the plaintiff in error and Edward S. Wykert, on the two promissory notes of \$500 each, above referred to. Service of summons was not made upon Wykert, nor did he appear in the action. Hughes answered admitting the execution and delivery of the notes. As a counter-claim he set up the said claims paid by him to an amount in excess of the sum due on the two notes sued upon, and also alleged that the \$1,000 not yet due was outstanding, with prayer that the excess found to be due him on his counter-claim, over and above the amount found due the plaintiff on the two notes, be declared a payment on the \$1,000 note. The case was tried to the court, who found that there was due the defendant in error on his cause of action the sum of \$1,315.76; that there was due the plaintiff in error on his counter-claim \$1,362.68, and judgment was rendered in favor of the plaintiff in error for \$46.92.

The face value of the claims paid by Hughes, including interest to the date of the trial, amounted to \$2,569.70. The trial court held that Hughes was only entitled to a credit for the amount actually paid to compromise the claims. There is no disputed question of fact. The only point presented to us for consideration and decision is whether Hughes should be allowed the face value of the claims, or only the amount actually paid?

We are all agreed that Hughes should be credited only with the amount actually paid by him in settlement of the claims. The notes given by Hughes & Wykert were held by the bank as trustee. By agreement of all the parties Hughes was to pay the notes to the bank and with the proceeds it was to pay the creditors of Swartz. The surplus, if any, belonged to Swartz. Instead of paying the money to the trustee, according to the arrangement, he

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compromised with the creditors, which operated as a payment of the claims. Swartz was entitled to the benefit of the compromise. Had a stranger to the transaction purchased the claims of the creditors at a discount he would have been entitled to their face value. But that is not this case. Hughes was not a stranger to the arrangement, but a party to it. His relation to the agreement, whereby the notes were placed in the hands of the bank, was such that he ought not to be permitted to reap the benefit of the compromise made with the creditors of Swartz. (*Catron v. Shepherd*, 8 Neb., 308.)

The judgment is

AFFIRMED.

THE other judges concur.

SAMUEL J. COFFMAN V. L. A. BRANDHOEFFER.

[FILED OCTOBER 21, 1891.]

1. **ACTIONS: WHEN COMMENCED: ATTACHMENT.** An action is considered commenced, so far as the right to issue a writ of attachment is concerned, as soon as the petition is filed in the proper court, and a summons is issued thereon with a *bona fide* intent that it shall be served.
2. ———: **LOCUS.** A suit for the recovery of money, when the defendant is a resident of the state, must be brought in the county where the defendant resides, or in the county where he temporarily is. Such action cannot be instituted in a county in which the defendant does not reside before he enters the county.
3. ———: **APPEARANCE: WHAT IS.** The filing of a motion to quash an attachment for want of jurisdiction over the person of the defendant and to issue the writ does not constitute a general appearance in an action.

ERROR to the district court for Douglas county. Tried below before CLARKSON, J.

33	279
d38	833
33	279
42	143
33	279
45	712
33	279
46	748

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Chas. Offutt, for plaintiff in error, cited, contending that the motion to quash constituted a general appearance: *Porter v. C. & N. W. R. Co.*, 1 Neb., 15; *Crowell v. Galloway*, 3 Id., 220; *Aullman v. Steinan*, 8 Id., 111; *Bell v. Olmsted*, 18 Wis., 71-5.

Schomp & Corson, contra, cited: *Carlisle v. Corran*, 2 S. W. Rep. [Tenn.], 26; *Bell v. Olmsted*, 18 Wis., 75-80; *Freeman v. Burks*, 16 Neb., 328; *Cleghorn v. Waterman*, Id., 226.

NORVAL, J.

This suit was commenced on the 3d day of April, 1890, in the county court of Douglas county by the plaintiff in error upon a promissory note signed by the defendant. At the same time an affidavit for attachment and garnishment was filed, and a summons, writ of attachment, and garnishee summons were issued, returnable May 5, 1890. The grounds for attachment were:

1. That the defendant was about to remove his property, or a part thereof, out of the jurisdiction of the court with intent to defraud his creditors.

2. That the defendant is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors.

3. That the defendant has property and rights in action which he conceals.

4. That the defendant has assigned, removed, or disposed of, and is about to dispose of, his property, or a part thereof, with the intent to defraud his creditors.

5. That the defendant fraudulently contracted the debt on which the action is about to be brought.

On April 25 the summons was returned not served, the defendant not being found in the county.

On April 7, 1890, the defendant filed the following motion:

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"Comes now the defendant, by his attorney, and makes this appearance specially and for the sole purpose of objecting to the jurisdiction of this court, and respectfully represents that this court has no jurisdiction of this defendant and no means of obtaining jurisdiction, and therefore no basis or authority for issuing an attachment against this defendant.

"Wherefore defendant asks that said attachment be withdrawn and declared void. J. G. WATTS,

"Attorney for Defendant."

The motion was accompanied by several affidavits showing that the defendant then was, and had been since 1885, a resident of Keith county, Nebraska, and was not in Douglas county on the 3d day of April, 1890, when the action was brought, and had not been there since January 27, 1890. There was also undisputed proof that an action was brought in the district court of Keith county on March 6, 1890, upon the same note sued on in this action, and said suit is still pending.

There was presented on the hearing of the motion the affidavits of the plaintiff Coffman, and Mr. Offutt, his attorney, to the effect that at the time the summons was issued they had information that the defendant was en-route to the county of Douglas from Keith county; that the summons was issued with a *bona fide* intention to have it served on the day it was issued, or before the return day thereof, and that the defendant was every few weeks in Douglas county, and plaintiff believes he will soon have an opportunity of having the summons served on the defendant in said county.

On April 25, 1890, said motion was sustained, and the county court of its own accord dismissed the cause for want of jurisdiction. On a petition in error to the district court the judgment of the county court was affirmed. This ruling is now assigned for error.

It is argued by counsel for defendant in error that the

county court was without authority or jurisdiction to issue the writ of attachment. In determining this question it is important to notice the provisions of our statute on the subject.

In chapter 20 of the Compiled Statutes, relating to county courts, we find this provision: "Sec. 16. Orders for arrest and for attachments of property may issue in actions under this chapter, but when the demand in such action exceeds the jurisdiction of a justice of the peace, the proceedings upon such orders shall be the same, as near as may be, as in actions brought in the district court. The return day of such orders shall, when issued at the commencement of the action, be the same as that of the summons; when issued afterwards, they shall be made returnable forthwith."

Section 198 of the Civil Code provides that "The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated," etc.

Section 203 provides "That the return day of the order of attachment, when issued at the commencement of the action, shall be the same as that of the summons; when issued afterwards, it shall be twenty days after it is issued."

Within the meaning of these provisions, at what time may a writ of attachment issue? The clear language of the statute is at or after the commencement of the action. For some purposes an action is not regarded as commenced until the defendant is summoned; while for others an action is deemed begun when the petition is filed and a summons is issued thereon, which is served on the defendant. Manifestly it was the intention of the legislature that an order of attachment could properly issue before the summons is served. The purpose of an attachment is to secure the property of the debtor for the payment of the judgment that shall be rendered against him. If the plaintiff must

wait until the service of a summons is made on the defendant before he can sue out an attachment, the remedy would be of little or no value. We conclude that an action is to be considered commenced, so far as the right to issue a writ of attachment is concerned, as soon as the petition is filed in the proper court, and summons is issued thereon with a *bona fide* intention that it shall be served. (*Hagan v. Burch*, 8 Ia., 309; *Reed v. Chubb Bros., Barrows & Co.*, 9 Id., 178; *Bell v. Olmsted*, 18 Wis., 75.) Of course attachment proceedings will be of no avail unless suit is brought in a court having jurisdiction, and personal service of a summons is made upon the defendant or service is obtained by publication, when such service is proper.

The next question presented is, Was this action properly brought in Douglas county? The suit is for the recovery of money and it is undisputed that the defendant was then a resident of the state and could have been personally served with a summons therein. This not being a local action, section 60 of the Code governs as to the county in which it must be brought. This section reads: "Every other action must be brought in the county in which the defendant, or some of the defendants reside, or may be summoned." The defendant was a resident of Keith county, and was not in the county of Douglas when the suit was instituted. The sheriff returned the summons indorsed "Not served, the defendant not found in Douglas county." Clearly the meaning of section 60 is that actions like this, if not instituted in the county where the defendant resides, must be begun in the county where the defendant actually is, and the summons must be served upon him while in the county. The suit cannot be commenced before he enters the county.

Section 2808 of the Code of Tennessee is as follows: "In all transitory actions, the right of action follows the person of the defendant, unless otherwise provided." While

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the language is different from our section 60, the meaning is substantially the same. The supreme court of that state, in construing said section 2808 in *Carlisle v. Cowan*, 2 S. W. Rep. [Tenn.], 26, uses this language, which we adopt: "This act, being in derogation of common law, will not be given a strained construction. By it a right of action follows the person of the defendant; and wherever he may actually be, though but sojourning, there he may be impleaded. His presence in the county, though not a resident, gives the court of the county in which he temporarily is, jurisdiction in transitory actions. If, while then actually in the county, the suit be instituted, and summons served upon him, jurisdiction is given. * * * If within the county at the time the suit was begun, the suit is well brought; if he was not, and he pleaded the fact that he was not, the suit ought to abate. Any other construction would permit a suit to be brought when the defendant neither was, at the time it was brought, a resident, or actually within the county. It would be to legalize the setting a trap which might await the coming of the defendant an indefinite time, and merely for the purpose of suing him out of the county of his residence. We do not believe such a result was intended by the legislature."

But it is urged that the defendant made a general appearance, and, therefore, jurisdiction was conferred. If the filing of the motion constituted a general appearance, then the conclusion contended for follows, for it is well settled in this state that if a defendant appears for any purpose other than to challenge the jurisdiction of the court, he submits himself to the jurisdiction of the court for all purposes. The purpose of the motion filed by the defendant was to quash the attachment, for the reason that the court had no jurisdiction over the person of the defendant and to issue the writ. No other relief was demanded. The defendant, therefore, did not make a general appearance in the case. (*Clegborn v. Waterman*, 16 Neb., 226.) In each of the

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cases of this court, cited in the brief of plaintiff in error, the defendant did more than to question the jurisdiction of the court over his person, and it was held to be a general appearance. The decisions referred to by counsel clearly do not apply to the case we are considering.

The suit being improperly brought in Douglas county, there was no authority for issuing the attachment. The county court did not err in dismissing the action, and the judgment of the district court is

AFFIRMED.

THE other judges concur.

**STATE, EX REL. CHARLES EBLE, V. WILLIAM LEAVITT
ET AL.**

[FILED OCTOBER 23, 1891.]

1. **ELECTIONS: REGISTRATION.** The city of N. is a city of the second class having more than 2,500 inhabitants, and is divided into four wards. The city is within N. precinct, which is six miles square and contains, outside of the city, about 300 voters. The county board has organized the territory above described, into a voting precinct, the votes to be cast in the city of N. *Held*, That the powers of a board of registration of the city of N. did not authorize such board to register any voter outside of the city limits.
2. ———: **POLLING PLACES.** That every legal voter of the precinct is entitled to vote at the place provided for that purpose by the county board, although such place may be within the limits of a city of the second class; and where there is more than one voting place in such city, he may vote at any one of them.
3. ———: ———: **COUNTY BOARD MUST PROVIDE.** It is the duty of the county board to provide a suitable number of polling places to accommodate the voters of the county, and no doubt the board may be compelled, in a proper proceeding, to provide proper facilities.

State, ex rel. Eble, v. Leavitt.

ORIGINAL application for *mandamus*.

Geo. H. Hastings, Attorney General, for relator.

Barnes & Tyler, contra.

No briefs filed.

MAXWELL, J.

The relator alleges in his petition that "he is a *bona fide* resident of the state of Nebraska, and has been for more than twenty years last past; that he is a citizen of the United States and a duly and legally qualified elector of the state of Nebraska; that he has resided in the county of Madison, and that portion of said county known and called Norfolk precinct; that he has so resided therein for more than ten years last past, and is entitled to the privilege of casting his vote at the coming general election to be held in this state on the 3d day of November, A. D. 1891.

"II. That the city of Norfolk, which is situated within the boundaries of said Norfolk precinct, as aforesaid, is a city of the second class having more than 2,500 inhabitants; that it is duly organized as such, and is exercising all the rights, duties, privileges, and franchises of such city; that the said city is situated within the boundaries of Norfolk precinct, which said precinct comprises a large amount of territory lying outside of the city limits of said city, and which said territory has residing therein and in the said precinct a large number of legal voters and electors, to-wit, more than 300 in number, who reside outside of the city limits of the said city; that said Norfolk precinct is one of the voting precincts of said county of Madison, duly established by the board of county commissioners thereof; that it comprises a portion of said county six miles square, and that the said city of Norfolk, above

mentioned, is situated within the said territory and comprises only a small portion thereof, and but a small portion of the said territory lies within the incorporate limits of the said city.

"III. That the said city of Norfolk is divided into wards and voting precincts, as provided by law, to-wit, the First, Second, Third, and Fourth wards, and that the defendants, William Leavitt, H. W. Winter, and A. H. Keisan, are the duly appointed, qualified, and acting board of registration for the first ward of said city of Norfolk; that E. G. Heilman, L. M. Gaylord, and W. F. Ahlman are the duly appointed, qualified, and acting board of registration in and for the Second ward in the said city; that August Satler, George Conevon, and C. G. Miller are the duly appointed, qualified, and acting board of registration in and for the Third ward in said city; that E. G. Hyde, G. W. Beymer, and P. H. Nelson are the duly appointed, qualified, and acting board of registration in and for the Fourth ward in said city of Norfolk, aforesaid.

"IV. That on Wednesday, the 14th day of September, 1891, your relator, who resides outside of the incorporate limits of the said city of Norfolk, duly presented himself to each of the several boards of registration above named, and asked and demanded of the said boards and each of them, that he be registered as a legal voter to the end that he might be entitled to cast his vote at the coming general election above mentioned; that each of the said several boards of registration, and all of them, refused to register your relator as a legal voter in said city of Norfolk, and still refuses so to do; that the reason assigned for such refusal by each of the several boards of registration is, that your relator is not a resident of the city of Norfolk, and has not resided within any of the said wards or within the incorporate limits of the said city, and is therefore not entitled to register or cast his vote in the said city, at the said election; that it is claimed on the part of the

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said boards, and each of them, that the persons residing outside of the incorporate limits of the city of Norfolk, and within the precinct, as above stated, of which your relator is one, are not entitled to vote within the said city, or in any of the wards thereof, but that a separate polling place should be established outside of the incorporate limits of the said city, where your relator and all other legal electors of the said Norfolk precinct so residing outside of the said city limits, should cast their votes; and that said persons, including your relator, are not required to register before voting, and are not entitled to be registered for that purpose.

"V. That the common council of the said city of Norfolk has never, in any manner, divided the territory lying outside of the incorporate limits of said city and within said Norfolk precinct as aforesaid, into wards or voting districts or precincts, and has not attached the same to any ward or wards within the said city; that the board of commissioners of said county has not established a polling place in said precinct outside of said city limits, but offer to do so if they have the right and authority so to do; that your relator desires to be registered as a legal voter so that he may cast his vote at the coming election; that he, in good faith, applied to the said boards of registration for that purpose, and that they wrongfully and unlawfully refused to register your relator and to permit him to be registered in any of the several wards of the said city, and that unless compelled so to do by a writ of *mandamus* of this court, your relator will be deprived of his privilege of casting his vote at said election, and that he has no adequate remedy at law in the premises.

"Wherefore your relator prays for a peremptory writ of *mandamus* directed to the respondents herein, commanding them to forthwith register the relator as a legal voter in the manner as provided by law."

The defendants demur to the petition and the cause is submitted on the demurrer.

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Sec. 1, ch. 76, Comp. Stats., provides: "It shall be the duty of the mayor and council of any metropolitan city or city of the first class, or city of the second class having over 2,500 inhabitants, which shall include all portions of the voting precinct in which said city is situated, to cause to be prepared books, for the registration of names and facts required by this act. Said books to be known by the general name of registers, and to be so arranged as to admit of the entering, under the name of each street or avenue in each election precinct, and the number of each dwelling on any such street or avenue, if there be a number thereto, and if there be no number, then under such definite description of the location of the dwelling place as shall enable it to be readily ascertained and found, the names of all legal voters in each dwelling in each of said precincts, who shall apply for registration. Such register shall be ruled in parallel columns, in which, opposite the name of every applicant for registration, shall be entered the words and figures hereinafter provided in this act, and shall be of such size as to contain not less than 800 names, and so prepared that they may be used at each election in any city governed by the provisions of this act, until such time as in this act providing for the succeeding general registration, and shall on the inside be in form as follows, to-wit:

Residence.	
Room No.	
Address.	
Sworn.	
Nativity.	
Color.	
Precinct.	Term of Residence.
County.	
State.	
Naturalized.	
Date of papers.	
Court.	
Qualified voter.	
Date of application.	
Why disqualified.	
Date of erasing name.	
Voted November.	
Month voted.	
Challenged.	
Remarks.	

It will be seen that the power of the board of registration is confined to voters residing within the city. The provision in the statute that the district "shall include *all* portions of the voting precinct in which said city is situ-

State, ex rel. Eble, v. Leavitt.

ated," does not extend the powers of the board so as to include voters residing beyond the limits of the city. It is designed to prevent any portion of the city from being omitted; in other words, the registration district shall include the whole city so that no voter shall be omitted.

Sec. 60, chap. 18, provides: "Each board of county commissioners shall divide the county into convenient precincts, and as occasion may require, erect new ones, subdivide precincts already established, and alter precinct lines. And whenever any portion of territory containing in the aggregate not less than one township of land, and not more than four townships lying contiguous, shall contain not less than fifteen voters, it shall be the duty of the county commissioners, on receipt of a petition signed by a majority of the legal voters therein; to constitute such portion of the territory a voting precinct."

Chap. 14, art. 2, sec. 9, provides: "Precinct lines in that part of any county not under township organization, embraced within the corporate limits of a city of the second class, shall correspond with the ward lines in such city, and such precinct shall correspond in number with the wards of the city, and be co-extensive with the same; *Provided*, That when a ward is divided into two election districts, the precincts corresponding with such ward shall be divided so as to correspond with the election districts; *And provided further*, That no justices of the peace or constables shall be elected in such precinct, and every such city shall constitute a district for the election of justices of the peace and constables, and in every such district there shall be elected two justices of the peace and two constables at the time provided by law for the election of such officers in other districts."

The division of a county into suitable voting precincts is devolved upon the county board of a county. It is presumed that that body will do its duty and provide a sufficient number to accommodate the voters. The voter

necessarily must vote at such place in his precinct as the county board shall provide. This may not be the best or most accessible place for that purpose, but nevertheless he must vote at the place provided or not vote at that election. The county board, however, must provide a polling place in each precinct where all the voters therein may be accommodated. The board cannot disfranchise any voters by refusing or neglecting to create a polling place in any precinct.

A republican form of government can only be maintained by the untrammelled exercise of the elective franchise and counting the ballots cast, and carrying into effect the will of the electors as declared through the ballot box. The powers of a board of registration of a city extend only to residents of the city embraced in the election district for which the board is sitting. Such boards have no authority, therefore, to register a voter residing without the limits of the city, although within the voting precinct as established by the county board. The object of registration is to prevent fraud in elections—not to prevent legal voters from casting their ballots. Experience has shown that election frauds, particularly in the colonization of alleged voters, is confined almost exclusively to the cities and larger towns, where from the nature of the case it is generally impossible, by reason of the great number of strangers, to distinguish those entitled to vote from those not so entitled. In the country and small towns, however, where nearly every voter is acquainted with every other voter in the precinct, with the right of challenge of any one of whom there is any doubt, there is sufficient protection against illegal voting; and therefore the requirement of registration which originally applied to the entire state is now limited to cities containing not less than 2,500 inhabitants. It would seem best to limit the election precinct to such territory as was embraced in an election district, but that is a matter for the consideration of the county board. No

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doubt any elector who is in danger of being deprived of the right to vote by reason of the want of sufficient accommodations may compel the board to create a sufficient number of polling places to accommodate all who may desire to vote, but the form of such districts necessarily must, to a great extent, be left to the county board. Any legal voter of Norfolk precinct, therefore, has a right to vote at the place in the precinct designated by the county board, and as such place is within the city of Norfolk, which has four wards and four polling places, it follows that such voters may cast their votes at any one of such places. It follows that the writ must be denied and the action

DISMISSED.

THE other judges concur.

33	292
46	598
33	393
049	178

COMMERCIAL NATIONAL BANK V. NEBRASKA STATE
BANK ET AL.

[FILED OCTOBER 28, 1891.]

1. **Assignment for Creditors: ATTACHMENT: INTERVENTION BY ASSIGNEE.** E. F. H. carried on a banking business in the name of the Nebraska State Bank, of Pawnee City. The original promoters and owners of the business had, before transferring it to E. F. H., taken ineffectual steps towards organizing the bank under the laws of this state. Neither of the owners had perfected such organization and E. F. H. was left the sole owner. Being in failing circumstances, he made an assignment of all his property, including that of his banking business, to the sheriff of the county, under the assignment law, for the benefit of all of his creditors. Subsequently the Commercial National Bank of Omaha brought its action against the Nebraska State Bank of Pawnee City, and attached the property assigned. L., the successor of the sheriff, as assignee, chosen by creditors, was permitted to intervene and defend against the action, and upon

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hearing, upon affidavits, the attachment was discharged. Upon error to the supreme court, *held*, that the assignee was a proper person to intervene, which it was his duty to do by permission of the court for the protection of the property in his hands as assignee.

2. —: TITLE VESTS IN ASSIGNEE. That the title of all of the property of C. F. H., not exempt from execution, including that used in the banking business, passed to and vested in the assignee.

ERROR to the district court for Pawnee county. Tried below before BROADY, J.

Montgomery & Jeffrey, for plaintiff in error:

Strunk and Lipp should not have been allowed to intervene. (*Bennett v. Whitcomb*, 25 Minn., 148; *Cornell College v. Iowa Co.*, 32 Id., 520; *Harwood v. Quimby*, 44 Id., 385; *Van Gorden v. Ormsby*, 55 Id., 657; *Kimbro v. Clark*, 17 Neb., 403.) Nor should they have been permitted to file and be heard upon their motion to discharge the attachment. The court erred in discharging the attachment. Hempstead and his individual creditors are now estopped to deny that the Nebraska State Bank was a corporation as to the creditors. (1 *Waterman, Corp.*, sec. 41; *Housel v. Creamer*, 13 Neb., 298.) Issuance of stock is not essential to the existence of a corporation. (Cook, Stock and Stockholders, secs. 10, 192, and cases; *Mitchell v. Beckman*, 64 Cal., 117.) The attempted assignment was unlawful. (*State v. Commercial State Bank*, 28 Neb., 677).

Story & Story, and *D. D. Davis*, contra:

The Nebraska State Bank is a corporation. (*Livesey v. Omaha Hotel*, 5 Neb., 52, 53, 67, 73, 74; *Gent v. M. & Mut. Ins. Co.*, 107 Ill., 652; *People v. R. Co.*, 35 Am. Dec. [N. Y.], 552, 555; *Selma & Tenn. R. Co. v. Tipton*, 39 Am. Dec. [Ala.], 355.) The assignees have a right to intervene. (*Smith v. Jones*, 18 Neb., 481; *Lining* v.

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Raymond, 12 Id., 170; *Dunham v. Greenbaum*, 54 Ia., 303; *Speyer v. Ihmels*, 21 Cal., 281.) The garnishee should have been discharged and the property released from the attachment. (*Speyer v. Ihmels*, 21 Cal., 281-88; *Rudolf v. McDonald*, 6 Neb., 166; *State v. Sandford*, 12 Id., 425; *Wells v. Lamb*, 18 Id., 353; *Schluter v. Raymond Bros.*, 7 Id., 281; *Lininger v. Raymond*, 9 Id., 46; 12 Id., 171; *Morehead v. Adams*, 18 Id., 574.

COBB, CH. J.

This action was brought by the plaintiff in error, in the district court of Pawnee county, January 13, 1890, against the Nebraska State Bank of Pawnee City, one of the defendants in error, alleging that the petitioner is a national banking corporation, and that the defendant is a corporation under the general laws of this state; that on November 2, 1889, the Pawnee Hay Company and S. E. Smith, for value received, made their promissory note to the defendant, due in ninety days, at ten per cent interest from maturity until paid, for \$3,000. The defendants represented the makers to be solvent and itself to be responsible, in assets above liabilities, to the amount of \$25,500, under which representations the plaintiff in error purchased the note for \$2,939.33. It is alleged that these representations were false, made for fraudulent purposes, and that the defendant and the makers of the note were insolvent, by reason of which the plaintiff in error offers to rescind its contract, tenders back the note to defendant, deposits it with the clerk of the court, and claims the sum of \$2,939.33 with interest at seven per cent from November 4, 1889.

II. On November 25, 1889, C. D. Dundas made his promissory note for \$1,600, due in sixty days, with interest at ten per cent after maturity, payable to the order of defendant. Prior to which the defendant, by its officers, had represented to the plaintiff that it was loaning money

to Dundas on his notes, which were well secured by valid county orders drawn in favor of defendant upon Cass and Lancaster counties, for money due to Dundas from said counties. The defendant, by its officers, had also represented that it was financially responsible, and was possessed of assets above its liabilities to the amount of \$25,500.

On November 29, 1889, at the request of the defendant, under the representations stated, the plaintiff bought the note of Dundas, paying the defendant therefor \$1,579.02. Recently the plaintiff was informed, and now alleges, that the defendant's representations as to the security of the note and the solvency of defendant, were false, and were knowingly made for fraudulent purposes. By reason of which the plaintiff rescinds the contract and purchase of the note, and hereby tenders the note back to defendant, and deposits the same for that purpose with the clerk of the court, and claims judgment for \$1,579.02 with interest at seven per cent from November 29, 1889.

III. On December 17, 1889, C. D. Dundas made his promissory note for \$435, due in sixty days, with interest at ten per cent after maturity, payable to the order of defendant, which the plaintiff, on December 18, 1889, bought for the sum of \$428.99, under the same conditions and representations made by the defendant as those stated, which contract and purchase is also hereby rescinded, and the note tendered back, and for that purpose deposited with the clerk of the court. The plaintiff demands judgment for the aggregate sum of \$4,947.34 with interest as stated.

On January 28, 1890, the petition of A. D. Strunk, sheriff of Pawnee county, assignee of E. F. Hempstead, and Reuben Lipp, his successor, as assignee, intervenors in the suit, set up that on December 21, 1889, Hempstead was the sole owner of the Nebraska State Bank of Pawnee City, and was alone responsible for its liabilities; that on said day Hempstead was also engaged in operating the Pawnee City Electric Light Company as its sole owner

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and proprietor, and being unable to meet his obligations, made an assignment of all his property, real and personal, including the electric light company's plant, and the effects of the Nebraska State Bank, for the benefit of his creditors, to A. D. Strunk, sheriff of Pawnee county, who accepted the trust and took possession of the property; that on December 30, 1889, Hempstead filed in the office of the county judge an inventory of his property, and the county judge gave notice to creditors to meet at his office at 1 o'clock P. M., January 14, 1890; that on January 13 the plaintiff commenced its action attaching certain real and personal property in the hands of Strunk, assignee, and serving notice of garnishment upon him on the following affidavit, dated January 10, 1890:

"A. P. Hopkins, president of the plaintiff, deposes and says that the plaintiff has commenced an action against the defendant in the district court of Pawnee county to recover \$4,947.34 now due and payable to the plaintiff from defendant on demand for money had and received by defendant to the plaintiff's use in the year 1889, to-wit, November 4, \$2,939.33; November 29, \$1,579.02; December 18, \$428.99; that said claim is just, and that he ought, as he believes, to recover thereon the sum of \$4,947.34, and that the said defendant has property and rights in action which it conceals; that the defendant has disposed of its property with the intent to defraud its creditors; that the defendant fraudulently contracted the debt and incurred the obligations for which said suit is about to be brought; that A. D. Strunk, sheriff of Pawnee county, as affiant believes, within said county, has property of the defendant in his possession, which an officer cannot come at for levy thereupon of an order of attachment, consisting of the books and papers of defendant, notes, mortgages, bills receivable, other evidence of indebtedness, money, accounts of overdrafts, chattels of various description of which affiant cannot give. And further deposes and says that the

sheriff, by reason of his interest in the subject-matter of this litigation and his relation to the property to be attached, and because he must be served as a garnishee in this action, will not, and cannot, faithfully perform his duties in this action about to be commenced, and should not be required or allowed to serve process therein."

The order of attachment, and notice as garnishee to the sheriff, issued to the coroner January 13, 1890, was returned as follows: "Received this order January 14, 1890, and not being able to come at the property of the Nebraska State Bank, claimed to be in the possession of the sheriff of Pawnee county, on January 15, 1890, at 11 A. M., I served on the sheriff a certified copy of the order, and a written notice to appear on April 14, 1890, and answer therein as required, a copy of which is herewith returned.

"Also, on the same day, at 11:30 A. M., in the presence of J. C. French and W. H. Mahan, two disinterested residents of the county, I attached the real estate: 'Beginning at the northeast corner of lot 1 in block 2 in Pawnee City, according to the record plat thereof, running thence west 77 feet, thence south 22 feet, thence east 77 feet, thence north 22 feet to the place of beginning. Also the south one-third of lots 1, 2, and 3 in block 13 in Pawnee City, according to the recorded plat. And after administering an oath to the appraisers, French and Mahan, to make a true inventory and valuation of said real estate in writing, I did then, with them, make an inventory and appraisalment of the same which is herewith returned; and also at the same time posted upon each of said tracts a duly certified copy of this order, there being no occupant thereon.' First tract appraised at \$5,000, second tract at \$6,000."

On January 14, the creditors, eighty in all, met at the county judge's office and chose, by ballot, Reuben Lipp to succeed Strunk as assignee, which choice was approved. On January 21, following, Strunk and Lipp entered an

inventory and appraisement of the entire estate of Hempstead to the county court, and within two days Lipp filed his bond in \$70,000, more than double the amount of the appraised value of the estate assigned, to the satisfaction of the county judge, which bond was deposited with the county clerk.

That said assignment having been made for the benefit of all the creditors, by reason of the plaintiff's attachment and garnishment proceedings the sheriff was prevented from turning over to his successor, as assignee, the property attached and garnished, and prevented from discharging his trust as assignee.

The intervenors ask that the assignment of Hempstead be decreed valid, and that the attachment of the plaintiff, and all garnishments under it, be discharged, and that the assignees be decreed to be in possession of all the property for the purpose of an equal division and payment to all the creditors.

On January 28, following, the intervening parties moved to dissolve the attachment and to discharge the attached property and garnishee, for the reason that the facts stated in the affidavit for the attachment are not sufficient to justify the same and the statements therein are untrue; and because the property at the time of the attachment was in the possession and control of the assignee of Hempstead, the owner of the defendant bank, under a valid deed made for the benefit of all of his creditors, and Lipp is the duly qualified successor and assignee of Hempstead.

On January 29, following, the defendant moved the discharge of the attachment as to the whole of the property attached on like grounds.

On February 15, following, the plaintiff moved that the petition of the parties intervening, and all motions by them, be stricken from the files for the reason that the same have been presented without leave, by parties without interest in the subject-matter of the action.

On February 17, following, the intervening parties answered the plaintiff's petition denying the allegations, but setting up that Hempstead indorsed and sold to the plaintiff the notes described, and before the commencement of this suit, indorsed to the plaintiff as collateral security fourteen other notes amounting to \$2,939.94; also certain orders from C. D. Dundas which the plaintiff retained in possession without rendering them to the assignee of Hempstead; that the plaintiff was collecting the notes and county orders and applying the proceeds upon other notes which were indorsed and sold by Hempstead to the plaintiff along with those described in his petition.

On April 29, 1890, there was a trial to the court, on the motions and issues submitted, the defendant making default of appearance and defense, the court held that the plaintiff's attachment be sustained against the defendant, the Nebraska State Bank of Pawnee City, and that the defendant's motion to discharge attachment be overruled, to which the defendant and the intervenors duly excepted. It was also held that the motion to strike the intervenor's petition from the files be overruled, and that Strunk and Lipp be permitted to intervene and defend the action, and prosecute their motion to discharge the attachment and for release of the property, to which the plaintiff duly excepted. It was further held that the intervenor's motion be sustained, and that the property attached in the hands of Strunk, assignee and garnishee, be discharged and released, to which the plaintiff duly excepted.

The plaintiff in error assigns its objection that Strunk and Lipp should not have been permitted to intervene, and prosecute their motion for the discharge of the attachment, which motion should have been overruled.

It appears from the record that on September 9, 1885, the defendant filed in the office of the county clerk of Pawnee county, articles of incorporation:

"For the purpose of carrying on the business of bank-

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ing under the corporation laws of Nebraska, the subscribers to the capital stock of the corporation adopted the following articles of incorporation :

"1. The name and title of Nebraska State Bank.

"2. The place and location of its general business transactions, Pawnee City, in Pawnee county.

"3. The general nature of its business, the purchase and sale of bills of exchange, receiving deposits, and discounting notes, with such other business as is generally transacted by bankers.

"4. The authorized capital stock shall be \$50,000, divided into shares of \$100 each, one-half of which shall be paid in on October 26, 1885, and the remainder in installments at such times as the board of directors may order.

"5. The commencement of the corporation shall be October 26, 1885, and the termination October 26, 1915.

"6. The highest indebtedness the incorporation shall at any time assume, exclusive of bank deposits, shall be \$25,000.

"7. The affairs of the corporation shall be conducted by a board of directors of not less than three, who shall be elected annually on October 26, provided that each share of stock shall entitle the holder to one vote.

"8. The board of directors, a majority of whom shall be a quorum to do business, shall elect one of their number to be president, and shall appoint a cashier and such other officers and clerks as may be required to transact business. They shall also have power to make and adopt necessary by-laws to govern the same, provided that each share of stock shall entitle the holder to one vote.

"September 9, 1885.

"(Signed)

W. C. HENRY.

"A. H. HENRY."

It also appears from the record that on December 21, 1889, E. F. Hempstead made the following assignment of his property :

"Know all men by these presents, that whereas I, E. F. Hempstead, of Pawnee county, Nebraska, sole owner of the Nebraska State Bank, am indebted in considerable sums of money and have become unable to pay and discharge the same with punctuality, or in full, and desirous of making a fair and equitable distribution of all my property and effects not exempt from attachment and execution, among my creditors, do hereby, in consideration of the premises and of the sum of one dollar to me in hand paid, convey to the sheriff of Pawnee county, Nebraska, A. D. Strunk, the following described real estate, situate in said county :

"Bank property.—All that parcel of land beginning at the northeast corner of lot 1 in block 2, in Pawnee City, and thence running west 77 feet, thence south 22 feet, thence east 77 feet, and thence 22 feet north to the place of beginning, with all the appurtenances thereunto belonging.

"All lot 10 in block 19, in North Pawnee City, according to the recorded plat. Also lots 1, 4, and 5 in block 1, in North Pawnee City, this being the homestead of the grantor, out of which he reserves his homestead right of \$2,000.

"Also the south third of lots 1, 2, and 3 of block 13, of Pawnee City, including the electric light plant thereto attached, with all franchises, lamps, poles, wires, and property of every description whatever.

"Also section 36, township 8, range 14 west, situate in Kill Creek township, of Osborn county, Kansas, together with all my personal property of every name and description, excepting only such as is exempt from attachment and execution.

"This conveyance is made in trust for the use and benefit of all my creditors and in conformity to an act of the legislature, entitled 'An act regulating the voluntary assignment for the benefit of creditors, proceedings thereunder, and to prevent the fraudulent violation of the same, approved February 26, 1883.' And the said trustee is

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hereby authorized and directed to take possession of all my said real and personal estate not exempt by law and to sell and dispose of the same and to convert it into money and apply the avails thereof: First, to the payment of any public tax or assessment charged against myself on said property; second, the payment of the fees and allowances of the assignee, the county judge, sheriff, and other officers; third, the payment of preferred claims; fourth, the balance to be divided equally among my creditors.

"The real estate claimed by me as exempt is a two-thousand-dollar interest as homestead to lots 1, 4, and 5 of block 1, of North Pawnee City, Nebraska.

"E. F. HEMPSTEAD."

The order of attachment, based upon the claim that the indebtedness of the defendant was fraudulently contracted, and that there was a fraudulent assignment of its property to the sheriff, is supported by the supplemental affidavits of A. P. Hopkins, William G. Maul, and Alfred Millard, officers of the plaintiff in error, and that of J. K. Goudy, showing the condition of the defendant bank at the close of business, October 30, 1889, as sworn to and published by its officers:

RESOURCES.

Loans and discounts.....	\$34,552 41
Overdrafts, secured and unsecured	2,747 26
Other stocks, bonds, and mortgages.....	1,600 00
Due from national banks.....	1,283 63
Assets not enumerated.....	3,000 00
Real estate, furniture, and fixtures.....	7,000 00
Current expense and taxes paid.....	2,603 04
Checks and other cash items.....	1,448 13
Bills of other banks.....	1,859 00
Fractional paper currency, nickels, and cents ..	8 09
Specie.....	413 05
Legal tender notes.....	500 00
Total.	<hr/> \$57,014 61

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LIABILITIES.

Capital stock paid in.....	\$21,000 00
Undivided profits.....	2,373 00
Deposits subject to check	9,016 91
Demand certificates of deposit	18,871 61
Notes and bills rediscounted.....	15,572 86

 Total.....\$57,014 61

In rebuttal, it appears, from the affidavit of S. Ed. Smith, that from January 1, 1887, to July 1, 1889, he was engaged in the banking business with E. F. Hempstead, under the name and style of the Nebraska State Bank; that no stock was ever issued by the bank, and that he never owned any shares of stock in the bank; that on July 1, 1889, he disposed of his interest in the bank to E. F. Hempstead, and from that time until its failure, December 21, 1889, he had no connection with it except as cashier for Hempstead at such odd times as he was needed; that he was only in the bank occasionally, and did not pretend to keep informed as to its business; that on September 1, 1889, he called on Messrs. Hopkins and Maul, at the plaintiff's bank in Omaha, and represented that he had met with losses, but made no representation that he was solvent, or that the hay company was solvent, nor did he in any manner attempt to mislead them in regard to the status of the hay company, but told them that Hempstead had drawn money out of the bank and put it into the electric light company, and into a residence for himself; and probably also that Hempstead was solvent, as he then fully believed that to be true; that he represented that it was on account of his losses in the hay business, and the withdrawal of money by Hempstead, that the bank was compelled to carry so heavy an amount of rediscounts; that he made no representation as to the responsibility of the rediscount paper, generally, as he was not then informed about it; that he did not remember that the Dundas loans

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were mentioned, but explained to them about the Duer paper, and other overdue paper in litigation.

From this interview, the plaintiff concluded that the Nebraska State Bank should furnish it further collaterals, which, soon after, were furnished. Affiant was in the state of Illinois when the assignment was made, knew nothing of it, and had no interest in the property conveyed, of which E. F. Hempstead was the sole owner at the time.

It appears also from the affidavit of E. F. Hempstead, that on December 21, 1889, he was the actual and sole owner of the Nebraska State Bank, defendant, and that neither S. Ed. Smith, nor any other person, had any interest of any kind therein; that the only relation Smith had borne to the bank after July 1, 1889, was that of a cashier on a stated salary, working for affiant, and was authorized to sign commercial paper as cashier; that no stock was ever issued by the bank, and that Smith never owned any shares of stock therein; that, so far as affiant represented in March, 1889, the Pawnee Hay Company and Smith had a large amount of hay on hand, ready for market, which when sold would pay their obligations, he believed the same to be true, and but for a depression in the market with unfavorable weather which caused 1,200 tons to be wasted and lost, would have proved true; that during the summer of 1889 the hay company and Smith paid \$3,000 of the \$6,000 of their paper discounted by the plaintiff; that affiant told the plaintiff and its officers that the defendant bank was secured by orders for warrants on the different counties where Dundas was working as a bridge contractor, authorizing the county clerks to pay to the Nebraska State Bank whatever sums were owing to Dundas; that he had such orders for warrants to be issued, and sent them to the counties, and believed the plaintiff may yet realize a large amount of money thereon; that he fully believed that the loans were good and secured; that within the past year Dundas has paid and taken up notes of

\$3,000; that affiant never represented that he only let Dundas have money when such orders were deposited.

At the time of making this assignment affiant was the only person interested in the bank, or who had authority to make an assignment.

It is objected by the plaintiff in error that the intervention and appearance of Strunk and Lipp were not sanctioned by any claim of interest in the matter in litigation; that the debt of the defendant, for money loaned to it, was wholly foreign to any individual interest set up by the intervenors, who were without any legal motive to intervene in the matter in controversy, or the attachment laid on the property in controversy. The property was in the hands of the intervenors as assignees of the plaintiff's debtor; in fact, for the benefit of all the creditors. This fact is not disputed. Section 38 of chapter 6 of the Compiled Statutes, p. 87, provides: "(Suits by assignee.)—The assignee shall have full power, except as in this act otherwise provided, to sue for and recover in his own name as assignee all and singular the estate, property and effects, real and personal, and amounts owing upon choses in action, and to execute and give releases and acquittances and discharges, and generally to do all manner of things requisite and convenient for the speedy and effectual collection of the estate which the assignor or assignors might or could have made, given, or done if such assignment had not been made." This authority, we hold, entitles the parties to plead as intervenors in this action, as representing the defendant in interest and the creditors of the assignor. It is believed to be the proper rule that a voluntary assignment for the benefit of creditors, if valid, is not a mere agency of the debtor, but that it remains as a trust for the benefit of the creditors.

In the action of *Lininger v. Raymond*, 12 Neb., 170, Justice MAXWELL, who delivered the opinion, held that "where the debtor parts with all control of his property,

and devotes it absolutely to the payment of his debts without reservation, the advantage to the creditors is clear and direct, and although there may be delay in the payment of the debts, still the assignment is not fraudulent and will not be declared void. The assignee is a trustee for the creditors. Under his assignment he may sue for and recover any money or property belonging to the trust estate, no matter where the same may be."

The question was again more elaborately considered, by the same justice, in the case of *Smith v. Jones et al.*, 18 Neb., 481, and it was admitted that in England the "courts seem to hold that primarily such assignments do not create a trust, nor clothe the creditors with the character *cestuis qui trustent*, but merely make the assignee an agent of the debtor to dispose of and apply the property under the debtor's directions; yet in this country it is held that a voluntary assignment for the benefit of creditors, if valid, is not a mere agency of the debtor, but creates trust relations, and the creditors are the beneficiaries. The assignee, therefore, can maintain an action to protect the trust estate." (1 Johns. Ch. [N. Y.], 119; 4 Id., 136; Id., 523; 4 Pick. [Mass.], 518; 8 Id., 113; 18 Id., 46; 5 Watts [Pa.], 343; 38 Ala., 370.)

In this view we conclude that Lipp, the assignee in office, by virtue of his election under the statute, was a party interested, or at least claiming an interest in the matter in litigation, and as such entitled to intervene in the action, and to become a party thereto under the provisions of sec. 2 of chap. 100 of the Session Laws of 1887; and that it was his duty so to intervene under the provisions of sec. 38 of chapter 6, Compiled Statutes of 1889.

It clearly appears from the affidavits preserved in the bill of exceptions that the defendant bank was never duly or otherwise organized as a corporation under the laws of this state. There does not appear to have been either capital stock divided into shares, paid in, or otherwise; nor a

board of directors, nor other officer, or officers, capable of doing business as a banking corporation.

The principal question presented by the record and argument of counsel is, whether the property levied on under the plaintiff's attachment, as well as that in the hands of the assignee at the time of the service of the summons in garnishment upon him, passed to the assignee under and by virtue of the deed of assignment of E. F. Hempstead? There is but little evidence as to the title of the real property; none whatever even tending to show title to any of it in the real or pretended Nebraska State Bank of Pawnee City. From the affidavits of W. C. Henry and S. E. Smith, it appears that the paper title to the lot upon which the business of banking was carried on was, at the date of the assignment, in E. F. Hempstead, and not in the bank. As to the other parcels of real property, there is really no evidence where the paper title was; but as they were described in the deed of assignment of E. F. Hempstead, I think that, until there is at least some evidence to the contrary, it will be presumed that the title was in him. This upon the ground that in this court all doubtful facts will generally be construed in such a way as to uphold the judgment of the court below. As to the chattel property contemplated by the deed of assignment, it was the property of the assignor only upon the theory that the Nebraska State Bank of Pawnee City was merely a name assumed by him. This, as a matter of fact, was true, but it is equally true that, in the transaction of the business with the plaintiff, upon which the indebtedness for which the suit was brought (as well as that with the other creditors severally, for whose benefit, as well as that of the plaintiff, the assignment was made), he assumed to act as the president of a banking corporation legally incorporated, and doing business as such. It cannot be disputed that in a proper case, presented by appropriate pleadings, he would be estopped to deny the truth of such assumption, or to

avail himself of the fact that it was false. But while I am not entirely without some degree of doubt, I conclude that this is not a case for the application of the doctrine of estoppel. The right of a debtor, who is unable to pay his debts, to make an assignment of all his property to be equally distributed among his creditors in proportion to their several demands is a right to be upheld when possible and its exercise encouraged; and while he may be estopped to make such disposition of his property by judgment or deed, he cannot be, by mere conduct, or matter of estoppel *in pais*.

The deed of assignment was executed, acknowledged, and delivered on the 21st day of December, 1889. At that date there was neither deed nor record standing in the way of such assignment; the plaintiff's affidavit for attachment being made January 10, 1890 and filed three days later. It is not claimed, nor could it be, that E. F. Hempstead, or his assignee, had committed any act, or failed in any duty, proper to be considered in this case, between the date of the assignment and that of the attachment. So that the status at the date of the assignment is alone to be considered in the application of the law to this case.

If it be admitted, which I think it must under the proofs, that Hempstead was largely indebted, that his creditors were numerous, that he was unable to pay his debts promptly and in full, and that he was the owner of a large amount of property, real and personal, it follows that it was his duty, as well as his right, to make a general assignment, with the qualities provided by statute, the first of which is that it "shall be of all the property, real and personal, of the assignor therein named, wherever situated, except so much thereof as may be exempt from levy and sale on execution under the general laws of the state." It made no difference that he had by his conduct held out to the world in general, and to part or all of his creditors in

particular, that part or all of such property was the property of a bank. Neither the letter nor the spirit of our assignment law will permit such conduct to stand in the way of its execution and full operation. Otherwise the object and purpose of the assignment law would be defeated in all cases similar to the one at bar. Unless an assignment executed by Hempstead would convey the title to the property in question, then it was entirely without the scope of the assignment law, for there was no other person, either natural or artificial, in existence who could assign it. The right to make an assignment in trust for the benefit of its creditors doubtless exists in a corporation but it can only be exercised by the corporation itself and not by its president by virtue of his general powers as such. So, even were it possible that the conduct of Hempstead might for certain purposes and the aid of the doctrine of estoppel make him the president of a bank, it could not furnish him with a board of directors nor empower him to perform any act legally vesting in such board. (See *Burwell on Assignments*, sec. 54.)

As hereinbefore stated, the assignment law in force at the date of the assignment, and still in force, requires all assignments under it to be of all the property of the assignor not exempt from execution. It also forbids all preferences of one debt or creditor above another, except in the instance of a laborer's wages to a small amount. Also by requiring all assignments to be made to the sheriff of the county, it renders favoritism in the *personnel* of the assignee impossible and places the execution of the assignment in the hands of a *quasi*-officer who is under a sufficient bond for the faithful execution imposed by the trust contemplated by such assignment. The law thus provides what is believed to be the cheapest, fairest, and most equitable method of distributing the property and assets of an insolvent or failing debtor among his creditors, and the courts will give it a liberal as well as an intelligent con-

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struction. The order and judgment of the district court assigned for error is

AFFIRMED.

THE other judges concur.

PRENTISS D. CHENEY V. WILLIAM WAGNER.

[FILED OCTOBER 28, 1891.]

1. **Specific Performance: WAIVER OF BENEFITS UNDER A DECREE.** One W. brought an action against C. for specific performance of a contract for the sale of land. He alleged in his petition that "on the 2d and 12th days of October, 1882, he paid the installments of both principal and interest, due in three and four years after said last mentioned date, at the office of Russell & Holmes," etc., and had duly performed the conditions of the contract on his part. The court rendered a decree of specific performance in his favor, whereupon he withdrew the money placed with Russell & Holmes for C. *Held*, An abandonment of the benefit of the decree.
2. ———: ———. In this case the court will not consider whether or not Russell & Holmes are liable to C. for the money.
3. ———: ———: **COSTS.** The court below granted W. relief on the condition that he pay the amount with seven per cent interest to the clerk of the court within sixty days. *Held*, That as C. was entitled to the consideration for the land without further cost, that W. must pay interest at the contract rate, all costs in both courts, and the sum of one hundred dollars to Cheney's attorneys.

ERROR to the district court for Johnson county. **Tried** below before **BROADY, J.**

Chas. E. Magoon, for plaintiff in error, cited: *Sch. Dist. v. Randall*, 5 Neb., 411; *Aspinwall v. Sabin*, 22 Id., 77; *Keeler v. Elston*, Id., 311; *Eaton v. Hasty*, 6 Id., 419; *Hoitt v. Holcolmb*, 3 Frost [N. H.], 554; *Borden v. Fitch*,

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15 Johns. [N. Y.], 145; *Lawrence v. Jarvis*, 32 Ill., 310; *Shelton v. Tiffin*, 6 How. [U. S.], 186, 188; *O'Donohue v. Hendrix*, 13 Neb., 256.

S. P. Davidson, *contra*, cited: *Keeler v. Elston*, 22 Neb., 312.

MAXWELL, J.

This case was before this court in 1884 and is reported in 16 Neb., 202, the decree of the court below to enforce the contract being affirmed. In that case it was alleged by Wagner in his petition, that after plaintiff purchased said contract as above mentioned, to-wit, on the 2d and 12th days of October, 1882, he paid the installments of both principal and interest, due in three and four years after said last mentioned date, at the office of Russell & Holmes, Tecumseh, Nebraska, where said notes are made payable," etc. These allegations, with others in the petition, were duly verified by Wagner and supported by testimony, and were relied upon by the district court in rendering its judgment, and by this court in affirming the same. Immediately after the affirmance of the judgment by this court Wagner went to the bank of Russell & Holmes and withdrew the deposit upon which he had obtained the decree. Thereupon Cheney filed a petition to vacate the decree. Issues were joined, and on the hearing the court below rendered judgment as follows:

"And now, on this 24th day of December, A. D., 1887, the hearing hereof was completed over the objections and exception of said Wagner, and the court finds generally for said Cheney, and that the decree herein at the April term, 1884, was obtained by said Wagner on the faith that he would let said Cheney have the \$290 deposited with Russell & Holmes before that time; that the court then considered said \$290 said Cheney's money and as part payment for the land, and on this faith thereof made said decree; that

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after said decree was entered, said Wagner took and converted said money to his own use, which operated as, and was a fraud and contempt of court, and by reason whereof that said decree was obtained by fraud and should be set aside, provided that if said Wagner shall, within sixty days, pay to the said clerk of this court, for said Cheney's use, said \$290 and interest thereon at seven per cent per annum, then said decree shall stand and remain in full force. Said Wagner excepts to said findings.

"It is therefore adjudged and decreed by the court, that if said Wagner shall pay into court, to the clerk of this court, said \$290 for the use of said Cheney within sixty days from this date, with interest thereon from July 1, 1885, at the rate of seven per cent per annum, then said decree entered herein at the April term of this court, 1884, shall stand and remain in full force; but if said Wagner shall refuse to pay said money into court as above mentioned then it is ordered and decreed that said decree be opened up and vacated, and said cause stand for trial the same as if the same had not been entered."

No litigant who, in good faith, comes into a court of equity seeking relief, and alleging that he has duly performed all the conditions of the contract on his part to be performed, will pursue the course taken by Wagner in this case. Such conduct is entirely unjustifiable. A party obtains a decree of specific performance upon the representation that he has paid the consideration, or such part of it as was then due, to the person agreed upon in the contract to receive it, and immediately upon the entering of the decree withdraws the deposit. Such withdrawal of the money is, in effect, a waiver of a claim under the contract—an abandonment of the contract, although perhaps not so intended by the parties.

The fact that the person receiving the deposit may still be liable therefor is not now before the court, and will not be considered.

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Wagner did, as far as he was able to do so, defeat the right of Cheney to the consideration for the land. He has conclusively shown that he does not desire to do equity, and were this a trial court the former decree would be vacated and the action dismissed. Wagner has shown such a want of good faith as to justify denying him any relief. The trial court in this case, however, granted Wagner relief on certain conditions. These, however, are not sufficiently erroneous. Cheney was entitled to his money without any additional costs in the case. The decree of the court below will therefore be modified as follows: That Wagner shall within sixty days pay the amount due with interest at the contract rate to the clerk of this court, and that he pay all costs in both courts, and the sum of one hundred dollars to Cheney's attorneys. And in case he fails to conform to this judgment, that the former decree be vacated and the action dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ALONZO B. COOPER, APPELLANT, V. T. J. CHITTENDEN,
APPELLEE.

[FILED OCTOBER 28, 1891.]

1. **Real Estate:** AN AGREEMENT FOR THE EXCHANGE of real estate, to be enforced specifically, must be mutual in its character and certain in its terms. These are indispensable requisites to the granting of relief. Where the testimony is conflicting as to the terms of a verbal contract for the exchange of lands, the finding of the court thereon will be upheld, unless it is clearly wrong.
2. **A contract** to be enforced must be just and fair in all its parts and not a hard or unconscionable bargain.

APPEAL from the district court for Johnson county.
Heard below before BROADY, J.

L. C. Chapman, for appellant, cited: *Bates v. Moore*, 2 Bailey [S. Car.], 614; *Gee v. Hicks*, Rich. Eq. Cas. [S. Car.], 17; *Carter v. Brown*, 3 S. Car., 298; *Brown v. Hoag*, 29 N. W. Rep. [Minn.], 135, and notes; *Lear v. Chouteau*, 23 Ill., 39; *Warren v. Dickson*, 27 Id., 115; *Livesey v. Livesey*, 30 Ind., 398; *Osborne v. Endicott*, 6 Cal., 149; *Woods v. Dille*, 11 O., 455; *Connor v. Hingtgen*, 19 Neb., 472.

A. M. Appelget, contra, cited: *Waterman*, Spec. Perf., pp. 234, 280, 575, 576, 599; *Goddin v. Vaughn*, 14 Gratt. [Va.], 102; *Clark v. Lyons*, 25 Ill., 105; *Brake v. Ballou*, 19 Kan., 397; *Tyler v. Larimore*, 2 W. Rep. [Mo.], 179.

MAXWELL, J.

This is an action for the specific performance of a contract for the exchange of real estate. It is alleged in the petition that "on the 5th day of March, A. D. 1890, this defendant was the owner in fee simple of the following described property, to-wit: Lot No. 9 in block No. 2, in the city of Tecumseh, Johnson county, Nebraska, according to the recorded plat thereof, and on the 5th day of March, A. D. 1890, sold the same to this plaintiff; that the said sale was made upon the following agreement; that whereas this plaintiff was the owner of a 'timber claim' in and from the United States of America, dated March 17, A. D., 1890, to and for the following tract of land, to-wit: The S. W. $\frac{1}{4}$ of section 23, township 34, range 49, in the county of Las Animas and state of Colorado; that the same was in full force and effect; that this defendant wished to exchange the said lot No. 9 in block No. 2, in said city of Tecumseh, Nebraska, for the 'timber claim' for the said S. W. $\frac{1}{4}$ of sec. 23, town 34, range 49, same being the land above described; that this plaintiff and this defendant did

agree to exchange the titles and interest of each in the several tracts of land above described to each other; that in pursuance of said agreement, this plaintiff did make out in writing all the papers required to transfer all his rights, titles and interest in and to the S W. $\frac{1}{4}$ of sec. 23, town 34, range 49, and delivered said title papers to this defendant; that this defendant accepted and took into his possession all of said title papers; that this plaintiff has duly performed all of the conditions of said agreement on his part; that this plaintiff has been to this defendant and requested him to make to him the title papers as agreed upon, to the said lot No. 9 in block No. 2, in the city of Tecumseh, Johnson county, Nebraska, but that the said defendant refused, and still does refuse, to execute said papers to this plaintiff."

To this petition the defendant filed an amended answer as follows:

"Now comes said defendant and for his amended answer to the petition of said plaintiff, denies each and every allegation therein contained, excepting that defendant is the owner in fee of lot 9 in block 2, in the city of Tecumseh, Johnson county, and state of Nebraska.

"For a second and further defense to the action of said plaintiff, defendant was approached by this plaintiff, who represented to defendant that he was the owner of and could convey a good and perfect title to certain real estate situated in the county of Las Animas in the state of Colorado, and described, to-wit, the S. W. $\frac{1}{4}$ of section 23, in town 34, range 49, and proposed to trade the same and convey the same by good and perfect title to this defendant for certain real estate owned by this defendant situated in Johnson county and state of Nebraska, and described, to-wit, lot 9 in block 2, and lot — in said block 2, in the city of Tecumseh, in said county, agreeing to pay the amount then owing by the said Chittenden, to-wit, the sum of \$——, and being the balance of the purchase price

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agreed to be paid by this defendant for said lot —; and this defendant, relying upon said representations so as aforesaid made by the said plaintiff as to the title and the power of said plaintiff to convey said 'tree claim' by perfect title, accepted said proposition so made by said plaintiff; that said representations so made by said plaintiff were false and untrue, as he then well knew; that the said plaintiff has no title or interest in the lands claiming to be owned by him, which fact was unknown to this defendant at the time of his entry into the contract herein set out; that said tract of land had been, prior to said time, entered by said plaintiff under an act of congress providing for the entry of public lands for timber culture; that under said law all entries of public lands could only be made for the use and benefit of the party making the same, and any transfer, or attempt to transfer, said lands or any part thereof vitiated the entry of the lands so entered, and said lands then reverted to the government of the United States; that the representations made by the said plaintiff as to and regarding his ability to convey said lands was so made for the purpose of misleading this defendant and inducing defendant to enter into the contract herein set out, and which contract said defendant would not have entered into had it not been for representations made as aforesaid by said plaintiff, and which said representations were false, as then well known to said plaintiff, but of the truth thereof this defendant had no knowledge."

The reply is a general denial.

On the trial of the cause the court found in favor of the defendant and rendered judgment of dismissal.

The defendant on his direct examination testified in regard to the trade as follows :

Q. You may state to the court what conversation you had with the plaintiff Cooper on or about the 6th of March of this year, in your office, relative to the transfer of lots or lands claimed to be owned by him.

A. Well, I said I would trade for a tree claim; he represented he had a good claim—a claim on a good lot adjoining his farm; he had a good farm there and this was adjoining it, and it was a good claim; that he had done considerable improvement, but had not done enough; there was yet eight or nine days that he had, and that he had the privilege of giving it up, and I would commence where he left off. I says, I don't know anything about these tree claims; I cannot go out there; I have nothing to do with it; I supposed you had a claim; I supposed you would give me a claim to the lot. He said, he did; that was the claim; that he relinquished it. I didn't know anything about it; I wanted to see; I was giving him a house and lot, or two lots, and I went to see what there was about it; I didn't know anything about a tree claim, it was new to me; I had heard of them, but supposed there was a claim that a man could not trade it off if he didn't have any claim to it. I was not well at the time, and he came back again and I had some conversation with him, but very little; I was not well at the time; I had just had an attack of the grippe, but he came back Saturday night. I told him it was all right, I would trade with him; when he came Saturday night he brought this with him. I says "What do you give me?" He says, "I give you this." I says, "Don't you give me any claim." He says, "That gives it to you." I says, "This relinquishes it back to the government." He says, "That is the way these things are done, that is all there is to it." I says, "I cannot give this house and lot for nothing." I might as well go and get a tree claim myself, and refused to do it, and told him I would not give a deed to it at all.

Q. Go back to the 6th of March when he claims this contract was made with you in your office and tell the court what he said to you about his title, if he said anything, to the land.

A. He said he had a clear title.

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Q. What kind of a title did he say he would give you?

A. He would give me—there was nothing particular, only he said he would give me the claim, the title to it; I know nothing about tree claims.

Q. Use as near as you can the words he used at that time relative to it?

A. I cannot use the words exactly, but he gave me to understand he had a title to the land and he would give it to me; I didn't suppose that he was trading land that he didn't have.

The plaintiff, according to his own testimony, possessed a mere claim under the timber culture act of congress, and from a failure on his part to comply with the law, his right was about to expire when the trade was made. In effect, he was to give nothing of value for the lots in question. The rule is well settled that the agreement to be enforced must be mutual in its character and certain in its terms. These are indispensable requisites to the granting of relief. (*Rogers v. Joyce*, 4 Mc., 93; *Bronson v. Cahill*, 4 McLean [U. S.], 19; *Tyson v. Watts*, 1 Md. Ch., 13; *Beard v. Linthicum*, Id., 345; *Willard's Eq.*, 267.)

The terms of the proposed contract are uncertain. The plaintiff contends that he was to trade a timber claim to which he had no title, and could not convey, and which would lapse in a few days by reason of his failure to comply with the law, for the property set forth in the petition for which the defendant had a deed; while the defendant contends that the plaintiff represented to him, and he was induced to make the agreement upon the representation of the plaintiff, that he possessed the title. This being the state of the proof, the finding of the court cannot be disturbed. In addition to this it is a fundamental rule in the specific enforcement of contracts, that the contract sought to be enforced shall be fair and just in all its parts, and not a hard or unconscionable bargain. If the agreement is hard or unreasonable it will not be enforced. (*Kimberley v. Jen-*

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nings, 6 Sim. [Eng.], 340; Willard's Eq., 268.) This agreement, if made as claimed by the plaintiff, is hard and unreasonable, and will not be specifically enforced. It follows that the judgment of the court below must be

AFFIRMED.

THE other judges concur.

F. W. BALDWIN ET AL. V. WILLIAM RHEA.

[FILED OCTOBER 28, 1891.]

1. **Appeal: IDENTITY OF ISSUES:** THE PETITION examined, and held, to state the same cause of action sued on in the court from which the appeal was taken.
2. **Continuance: ERROR IN DENYING: CURED.** When a motion for the adjournment of a cause for a specified time is overruled, and the trial does not take place until the period asked for has elapsed, the error, if any, in not granting the motion in the first instance, is cured.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Pound & Burr, for plaintiffs in error, cited, as to the change of issues: *O'Leary v. Iskey*, 12 Neb., 136; *U. P. R. Co. v. Ogilvy*, 18 Id., 638; *Fuller v. Schroeder*, 20 Id., 631; *Sawyer v. Brown*, 17 Id., 171. As to the denial of a continuance: *Horn v. Queen*, 4 Neb., 108; *Gillette v. Morrison*, 9 Id., 395; *Johnson v. Dinsmore*, 11 Id., 291; *Newman v. State*, 22 Id., 355; *Sherrard v. Olden*, 1 Halstead [N. J.], 419; *Peebles v. Ralls*, 1 Little [Ky.], 24; *Stewart v. Durrett*, 3 Mon. [Ky.], 113; *Vannerson v. Pendleton*, 8 S. & M. [Miss.], 452.

" Comes now the plaintiff, William Rhea, and complains

of the defendants, Fred. W. Baldwin and Harry Meusser, and for cause of action alleges that the said defendants, during the year 1888, were partners engaged in operating a stock farm in Lancaster county, Nebraska.

"That this plaintiff engaged in work and labor for said defendants on said farm and did perform work and labor on the farm operated by the defendants and located near Malcolm, in Lancaster county, Nebraska, which said work and labor was done and performed between July 1 and December 1, 1888, at the agreed price of \$20 per month; that by reason of said performance of said work and labor so done and performed defendants are indebted to the plaintiff in the sum of \$100, with interest thereon from the 1st day of December, 1888.

"Wherefore plaintiff prays a work and labor judgment against the defendants for the sum of \$100 and interest at the rate of seven per cent per annum from the 1st day of December, 1888, and for costs of suit."

The only averment in the petition not found in the bill of particulars is the allegation that the defendants were partners. This variance in the pleadings was not such a departure as to require the petition to be stricken from the files. The suit in both courts was between the same parties to recover for the same services performed by the defendant in error for the plaintiffs in error. The cause of action being the same in both courts, the district court did not err in overruling the objection to the petition.

Objection is made to the refusal of the court to grant a postponement of the trial. On March 19, 1890, Baldwin's attorney filed a motion asking an adjournment for one week. The motion was supported by the affidavit of the attorney to the effect that Baldwin had gone to Illinois in response to a telegram announcing the dangerous illness of a near relative; that he had promised to return as soon as his relative was beyond danger, and that Baldwin was a necessary witness in his own defense.

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The motion was not submitted to the court until March 27, when it was overruled. In the meantime Baldwin returned home, and on March 26 made and filed, in support of his application for adjournment, an affidavit to the effect that he had returned to Lincoln for a short period of time to transact some business, that his relative Blanche Baldwin was still dangerously ill, and not expected to live, and on account of said sickness he is compelled to go to Illinois on the first train. We fail to see how Baldwin was prejudiced by the ruling of the court. Although the motion was overruled, the trial, as a matter of fact, was postponed for the time asked for therein. The motion was passed upon March 27, and the case was not tried until April 4. When a motion for the adjournment of a cause for a specified time is overruled, and the trial does not take place until after the period asked for has elapsed, the error, if any, in not granting the motion in the first instance is cured. The judgment is

AFFIRMED.

THE other judges concur.

A. D. STRUNK V. STATE, EX REL. REUBEN LIPP.

[FILED OCTOBER 28, 1891.]

Assignment for Creditors: CONVEYANCE TO ASSIGNEE: MANDAMUS TO SHERIFF. Where, after an assignment is made to a sheriff for the benefit of the creditors of the assignor, the creditors choose an assignee to succeed the sheriff in such trust, who qualified by entering into an undertaking as required by law, it is the duty of the sheriff to immediately execute and deliver to such assignee a deed of quitclaim of all real estate conveyed by the assignment, and in default thereof *mandamus* will lie to enforce the performance of the duty.

ERROR to the district court for Pawnee county. Tried below before BROADY, J.

J. K. Goudy, for plaintiff in error.

Story & Story, and *D. D. Davis*, *contra*.

NORVAL, J.

A petition was filed in the district court of Pawnee county by the defendant in error, against the plaintiff in error, which alleges, in substance, that one E. F. Hempstead, a resident of Pawnee county, on the 21st day of December, 1889, was the owner of certain described real estate situated in said county and in Osborn county, Kansas, and being in embarrassed circumstances, on that day made an assignment of all his property, both real and personal, not exempt by law, to A. D. Strunk, as sheriff of Pawnee county, for the benefit of Hempstead's creditors; that said deed of assignment was delivered to and accepted by said Strunk, who had the same duly recorded in the office of the county clerk of Pawnee county, and took possession of all the assigned property, and on the 30th day of December, 1889, made and filed an inventory of all the assigned property as required by law; that on the 14th day of January, 1890, the relator, at a meeting of the creditors of said Hempstead, was duly elected by said creditors assignee to succeed the respondents; that immediately thereafter relator and respondent, with two appraisers, made and returned to the county court an inventory and appraisal of the estate as prescribed by law, and within forty-eight hours thereafter the relator tendered to the county judge his bond as such assignee, who thereupon approved the same and filed it for record in the county clerk's office of said county; that relator has demanded of the respondent that he execute and deliver to him a quitclaim deed of said real estate in accordance with the provisions of the assignment law, but the respondent refuses to execute and deliver such deed to the premises or to any part

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thereof, and that by reason of the failure of the respondent to make such conveyance the relator is prevented from carrying out the trusts and duties imposed upon him by reason of his being the assignee of said assigned estate. The relator prays that a peremptory writ of *mandamus* may issue to compel the execution of such conveyance.

An alternative writ of *mandamus* was issued, returnable before the Hon. J. H. Broady, one of the judges of the first judicial district, at chambers, on the 7th day of June, 1890, to which the respondent filed an answer. On the hearing of the application the judge granted a peremptory writ of *mandamus*, as prayed.

As no motion for a new trial was filed in the court below, and as the evidence heard before the trial judge was not preserved in a bill of exceptions, we cannot determine whether or not the proofs were sufficient to justify the decision. It will, however, be presumed, in the absence of a bill of exceptions, that all averments of the petition were established by legal evidence.

The sole question before the court is whether the district judge had jurisdiction of the subject-matter. In considering the point it is important to keep in mind the provisions of the assignment law.

Section 5 of this law requires that in every deed of assignment for the benefit of creditors the sheriff and his successor in office of the county where the assignor resides shall be named as assignee. The next section, among other things, provides for the recording of the assignment in the office of the county clerk of the county in which the assignee resides.

By section 7 it is made the duty of the sheriff, immediately upon the execution and delivery of an assignment, to take possession of the assigned estate, and preserve and safely keep the same for administration according to law. It also makes the sheriff and his sureties liable upon his official bond for the faithful execution of the trust created

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by the assignment, for the preservation of the assigned estate, and for the accounting for and paying over of all moneys derived therefrom.

Section 8 provides that the assignor shall file an inventory with the county judge within ten days after the assignment is made, and specifies what the inventory shall contain.

Section 9 requires the county judge, immediately upon the receipt of the inventory, to fix a day, not more than fifteen days thereafter, for a meeting of the creditors of the assignor at his office for the purpose of choosing an assignee to succeed the sheriff, and that the county judge shall give notice of the time and place of such meeting.

Section 10 provides that "At the time and place fixed in such order, the creditors, or so many of them as shall be present in person or by proxy, may proceed by ballot to choose an assignee to succeed the sheriff, and the sheriff shall be eligible," etc.

Section 12 requires the sheriff and the assignee chosen at such meeting to immediately make and return an inventory and appraisement of the assigned estate to the county court, and the succeeding section makes it the duty of the assignee to give a bond, with two or more sureties, in double the amount of the appraisement, within forty-eight hours after the completion of the inventory, which undertaking is to be approved by the county judge.

It will be observed that the petition shows that every step required by the provisions of the above sections of the assignment law has been taken, but the respondent, as sheriff, refuses to convey the assigned estate to the relator, who was duly chosen by the creditors as assignee to succeed the sheriff, and has qualified as such. The relator bases his right to demand a conveyance upon the provisions of section 15 of the assignment law, which reads as follows:

"Sec. 15. Immediately upon the execution and approval of such bond the surety shall deliver all the personal prop-

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erty belonging to such estate to such assignee, and shall execute and deliver to such assignee, as such, a deed of quitclaim of all real estate conveyed by such assignment."

The language of the section is clear and unambiguous. Argument cannot make it plainer. It makes it the duty of a sheriff, who is named as an assignee in a deed of assignment for the benefit of creditors, to convey by deed of quitclaim to the person legally chosen by the creditors of the assignor as assignee to succeed the sheriff, upon the assignee qualifying as such, all the real estate conveyed to the sheriff by the assignment. That the relator in the case at bar is entitled to such a conveyance is plain. How is that right to be enforced is the question? Although the plaintiff in error has not favored us with a brief or argument, we gather from the reading of the brief filed by the defendant in error, that respondent insists that the district court has no jurisdiction to grant the relief demanded, and that this objection is based upon section 39 of the assignment law, which provides that "Full authority and jurisdiction is hereby conferred upon the county courts, and the judges thereof, to execute and carry out the provisions of this act, and said court shall at all times be and remain open for the transaction of business under this act."

Proceedings relating to the settlement of assigned estates are under the control of the county court and the judges thereof. The district courts have jurisdiction to review upon appeal their judgments and decisions. While the legislature has conferred upon county courts jurisdiction in matters pertaining to assignments, yet it does not follow that the district judge was without jurisdiction to grant the relief here demanded. Section 645 of the Code of Civil Procedure provides that "The writ of *mandamus* may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station," etc. The real estate of Hempstead was

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conveyed to the respondent as sheriff in trust for the benefit of the creditors of the assignor. Upon the election and qualification of the relator as assignee it was the duty of the respondent to convey to him the real estate covered by the deed of assignment. The respondents refused to perform a plain duty imposed upon him by law. *Mandamus* will lie to a public officer or person to enforce the performance of a duty which the law enjoins, when the respondent is in default of the discharge of such duty, and power is conferred by statute upon a judge of the district court, at chambers within his district, to hear and determine an application for a peremptory writ of *mandamus*. (Sec. 57, ch. 19, Compiled Statutes.)

Clearly it was not the purpose of the legislature, in clothing county courts with jurisdiction in matters pertaining to settlement of assigned estates, to in any manner interfere with, or limit, the power of district courts in proceedings by *mandamus*. The district court did not err in granting the writ, and the judgment is

AFFIRMED.

THE other judges concur.

HENRY K. WARREN, APPELLEE, v. CHAS. S. DEMARY
ET AL., APPELLANTS.

[FILED OCTOBER 28, 1891.]

1. **Tax Liens: FORECLOSURE: LIMITATIONS.** An action to foreclose a tax lien must be brought within five years after the cause of action accrued.
2. ———: ———: ———: **CASE STATED.** The plaintiff on November 5, 1877, purchased certain real estate at tax sale and on May 10, 1880, he surrendered the certificate of purchase, and received a tax deed for the land, which was invalid for defects appa-

38	397
38	746
38	327
138	814
33	397
41	276
38	327
143	497
33	327
54	16
43	327
56	653

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rent upon its face. On the 23d day of January, 1890, suit was instituted to enforce a lien for taxes paid. *Held*, That the action was barred.

APPEAL from the district court for Burt county. Heard below before CLARKSON, J.

Uriah Bruner, for appellant, cited: *Wygant v. Dahl*, 26 Neb., 562, 579; *D'Gette v. Sheldon*, 27 Id., 829.

N. J. Sheckell, contra.

NORVAL, J.

This is an action to foreclose a tax deed. The defense interposed is the statute of limitations.

The plaintiff on the 5th of November, 1877, purchased of the county treasurer of Burt county, at tax sale, the southwest quarter of section 14, town 23, range 8 east, for the taxes levied thereon for the year 1876, for the sum of \$27.63, and received a certificate of purchase. The plaintiff has paid the taxes assessed on the land for the subsequent years. On May 10, 1880, the county treasurer executed a tax deed to the plaintiff for the premises in question, which is invalid for numerous defects apparent upon its face, among which, that it does not have the official seal of the county treasurer. This suit was instituted on the 28d day of January, 1890. The plaintiff sets up in his petition the defects appearing upon the face of the deed, and prays a lien for the taxes paid. A decree was entered for \$461.15.

Section 180 of the revenue law provides that "If the owner of any such certificate shall fail or neglect to demand a deed thereon, or to commence an action for the foreclosure of the same, as provided in the preceding sections, within five years from the date thereof, the same shall cease to be valid or of any force whatever, either as against the person holding the title adverse thereto, and all other

persons, and as against the state, county, and all other municipal subdivisions thereof."

Sections 1 and 2 of the act of 1875, entitled "An act to provide a method of foreclosing tax liens upon real estate in certain cases," are as follows:

"Section 1. That any person, persons, or corporation, having, by virtue of any provisions of the tax or revenue laws of this state, a lien upon any real property for taxes assessed thereon may enforce such lien by an action in the nature of a foreclosure of a mortgage for the sale of so much real estate as may be necessary for that purpose, and costs of suit.

"Sec. 2. That any person, persons, or corporation holding or possessing any certificate of purchase of any real estate, at public or private tax sale, or any tax deed shall be deemed entitled to foreclose such lien under the provisions of this act, within any time not exceeding five years from the date of tax sale (not deed) upon which such lien is based; *And provided*, That the taking out of a tax deed shall in nowise interfere with the rights granted in this chapter."

It is manifest that under the above statutory provisions the plaintiff's action was barred when he instituted the suit. An action to foreclose a tax lien must be brought within five years from the time the cause of action accrued. This suit was brought nearly ten years after the tax deed was issued, and more than twelve years from the date of the tax sale. The deed was void on its face, and an action could have been maintained thereon to foreclose the lien as soon as the deed was issued. The plea of the statute of limitation is well taken. (*Helphrey v. Redick*, 21 Neb., 80; *Parker v. Matheson*, Id., 546; *D'Gette v. Sheldon*, 27 Id., 829; *Alexander v. Wilcox*, 30 Id., 793.)

The judgment of the district court is reversed, and the action dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

33 330
36 534
38 537

C. D. OSBORNE ET AL V. E. A. CANFIELD ET AL.

[FILED NOVEMBER 5, 1891.]

1. **County Court: BILL OF EXCEPTIONS.** In a term case in a county court the authority to prepare a bill of exceptions, in any case where such bill is authorized, continues during the entire term without any order of the judge extending the time, and he may sign a correct bill at any time before the term closes.
2. ———: ———: **ATTACHMENT.** Section 236e of the Code, which authorizes the filing of a petition in error upon an order of a court discharging an attachment, is general in its application and applies to all courts having jurisdiction in civil actions. Therefore a county judge may sign a bill of exceptions in any case where an attachment has been discharged by him.

ERROR to the district court for Douglas county. Tried below before GROFF, J.

Cornish & Robertson, for plaintiffs in error, cited: *Smith v. Kaiser*, 17 Neb., 184; *Morehead v. Adams*, 18 Id., 570; *Degering v. Flick*, 14 Id., 448.

Congdon & Hunt, contra, cited: *Taylor v. Tilden*, 3 Neb., 339; *Kellogg v. Huntington*, 4 Id., 96; *Smith v. Kaiser*, 17 Id., 184.

MAXWELL, J.

This action was brought in the county court of Douglas county by the defendants in error against Canfield and Reynolds to recover the sum of \$368.97 upon a promissory note. An affidavit was filed for an attachment before the debt became due and an attachment issued and levied upon certain goods of the defendants in error. The defendants in error thereupon filed a motion to dissolve the attachment because the grounds upon which it has been issued were false and untrue.

On the hearing, oral testimony was taken before the judge

in opposition to and support of the attachment. The court rendered judgment dissolving the attachment upon the ground "that the averments in the affidavits filed herein for attachment are untrue." At the same time all the attorneys in the case entered into a stipulation as follows:

"Whereas, in the above entitled action an order of attachment issued out of this court against Canfield & Co. and was levied by the sheriff of Douglas county upon property belonging to Canfield & Co.; and

"Whereas, after the levying of said attachment, a mortgage was given by Canfield & Co. to Price, Sherman & Co., H. Rothsteins' Sons, Dyer, Rice & Co., E. Morris & Co., A. G. Woodruff & Co., Tichnor & Co., Sonntag & Reyer, Johnson & Powell, R. G. Uhleman, Otto Waggoner, Frank J. Ramge, George O. Calder, and H. H. Baldrige, mortgagees;

"Whereas, upon motion duly made, said attachment was dismissed and dissolved by this court on the 8th day of June, A. D. 1889; and

"Whereas, the plaintiff herein intends to take this action and proceedings therein upon attachment to the district court of this county, and possibly to the supreme court of this state upon error:

"Now, therefore, it is stipulated and agreed by and between the plaintiff and the defendant herein and said above named mortgagees, that the property attached in this action be sold by the sheriff of this county at private sale without notice, at such price or prices and on such terms as George Frank, representing the above named mortgagees, and Edward J. Cornish, attorney for the plaintiff herein, shall advise; that the proceeds from such sale, after paying expenses thereof, shall be deposited by said sheriff in the Omaha Savings Bank at Omaha, Nebraska, and a certificate of deposit be taken by said sheriff therefor.

"If this action is finally determined in favor of the plaintiff, said sheriff shall turn over a sufficient amount of said

Osborne v. Canfield.

moneys, the proceeds of said sale, to Edward J. Cornish, attorney for said plaintiff, after deducting from said moneys the necessary costs to satisfy that judgment in this action, and the balance to be turned over to Congdon, Clarkson & Hunt, attorneys for the above named mortgagees.

"If this action is finally determined in favor of the defendant, said sheriff shall turn over to said Congdon, Clarkson & Hunt the entire amount of said moneys.

"It is further stipulated and agreed by and between the parties hereto that the amount of money received for said goods at said private sale shall be deemed the full value of said goods.

"And it is further stipulated and agreed by and between the parties hereto that any bond required by law to be given by the plaintiff herein shall be in the sum of \$800."

A bill of exceptions was then prepared by the attorneys for the plaintiffs in error and submitted to one of the attorneys for the adverse party, who at the time was sick in bed, the other being absent from the state. The attorney to whom the proposed bill was submitted thereupon sent the proposed bill to an attorney for the mortgagees with a note saying that he was too ill to examine the proposed bill, but requested said attorney to do so and act for them in the premises. This, in a letter addressed to the county judge June 27, 1888, he did, stating the bill was substantially correct as he remembered the facts. Thereupon on the same day the county judge appended this certificate to the bill: "I hereby certify that the foregoing bill of exceptions is allowed by me this 27th day of June, 1888, and contains all the evidence given and proceedings had on the motion to discharge the attachment therein." The case was then taken on error to the district court, where the following motion was filed:

"Now comes the defendants, by Baldrige & Calder, their attorneys, and move the court to quash the bill of exceptions herein for the reasons following:

"First—No time was given in which to prepare and serve bill of exceptions, nor in which to file same.

"Second—Same was not served and filed according to law.

"Third—Same is unauthorized and void."

This motion was sustained by the district court and thereupon the judgment of the county court was affirmed.

It is claimed on behalf of the defendants in error that no time was given in which to prepare a bill of exceptions and that therefore it should have been prepared at once and signed when the decision was rendered.

This evidently was a term case. In such case the authority of the judge to sign a bill of exceptions continues during the entire term. In a county like Douglas, where there is a very large amount of business before the court, it would frequently be impossible to prepare a bill during the trial. A reasonable time must be given for this purpose, and in the absence of an order limiting the time the right continues till the close of the term.

A somewhat similar question was before this court in *Hansen v. Bergquist*, 9 Neb., 269, and it was held that a judgment rendered on the 27th of the month, reversing a judgment rendered at the commencement of that term, would not be set aside, it being presumed that the court had jurisdiction.

The bill of exceptions was acceptable to the attorneys for the defendant in error, and is certified by the judge to be correct, and we must so hold and that it was properly signed and certified.

Second—The second objection in the motion is disposed of above, that where the bill is prepared during the term no order granting time in which to prepare the bill is necessary.

Third—The third objection is that there is no authority for the county judge to sign a bill of exceptions.

In this connection it is unnecessary to point out the difference in the practice between term cases tried in the

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county court, and cases where a justice of the peace has jurisdiction, as what we are about to say applies as well to a justice of the peace as to the county court.

Section 236e of the Code provides "That when an order discharging an order of attachment is made, and any party affected thereby shall except thereto, the court, or judge, shall fix the number of days, not to exceed twenty, in which such party may file his petition in error, during which time the property attached shall be held by the sheriff or other officer, during which period the petition in error shall be filed, and the party filing the same shall give an undertaking to the adverse party, with surety or sureties, to be approved by the court, in double the amount of the appraised value of the property attached, conditioned to pay said adverse party all damages sustained by such party in consequence of the filing of said petition in error, in the event that such order of attachment shall be discharged by the court, in which said petition in error shall be filed, as having been unlawfully detained."

A proper mode of reviewing the ruling of any court on a question of this kind is by petition in error based on a bill of exceptions.

An attachment is a special proceeding and ordinarily the case is to be heard in the appellate court upon precisely the same testimony as in the court where the action is brought. Hence a bill of exceptions is an effective and economical mode of review.

The remedy given by the above section is general in its application, the mode of review is as broad as the remedy, and the county judge has authority to sign a bill of exceptions. The court, therefore, erred in quashing the bill and rendering judgment for the defendants in error. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

STATE, EX REL. C. O. BATES, V. JOHN HUTCHINS ET AL.

[FILED NOVEMBER 5, 1891.]

1. **Exceptions** to certain findings of a referee overruled.
2. **School Elections: VOTING: EVIDENCE.** At a special meeting of the electors of a school district to vote upon the question of authorizing the school district board to build a school house, a vote was taken by a teller, who reported twenty-nine in favor of the proposition, and twenty-six against. Before the result was announced by the chairman, objections were made that more votes had been cast than there were voters present, whereupon the chairman, by placing those in favor of and those opposed to the proposition in separate lines, found that there were twenty-six voters in each, and thereupon voted "No." *Held*, That the final result of the balloting, as declared by the chairman, must be accepted as the decision of the electors, and that parol evidence was admissible to show that the vote taken by the teller was not the final determination of the meeting.

ORIGINAL application for *mandamus*.

J. H. Haldeman, for relator, cited, contending that evidence *aliunde* as to the vote was not admissible: *B. & M. R. Co. v. Lancaster Co.*, 4 Neb., 307; *Eddy v. Wilson*, 43 Vt., 362; *Sch. Dist. v. Atherton*, 12 Met. [Mass.], 105; *Morrison v. Lawrence*, 98 Mass., 219; 1 Dillon, Mun. Corp., sec. 299; *Mayhew v. Gay Head*, 13 Allen [Mass.], 129; *Boston T. Co. v. Pomfret*, 20 Conn., 590; *Gilbert v. New Haven*, 40 Id., 102; *Hoag v. Durfey*, Aikens [Vt.], 286; *Cooley, Tax*. [2d Ed.], 317.

H. D. Travis, for respondents.

Wooley & Gibson, for intervenor.

MAXWELL, J.

This is an application for a peremptory writ of *mandamus* "to compel the school district board of school district

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72, of Cass county, immediately to build and erect on the old school house site, a frame school house on a piece or parcel of land consisting of about one acre, one-half of which is the northeast corner of the northwest quarter and the other half the northwest corner of the northeast quarter of section 17, township 10, of range 12, in Cass county," etc.

The school board filed an answer in which they explain the causes of delay.

One William Westlake filed a petition to intervene in the case, and as he showed a *prima facie* right in his petition the prayer was granted.

The case was then referred to a referee to take testimony and find the facts. His report is as follows:

"First—That the relator, Charles O. Bates, is a citizen, legal voter, and taxpayer in school district No. 72, in Cass county, Nebraska, and that he has children of school age living with him in said school district.

"Second—That school district No. 72 is legally organized under the laws of Nebraska.

"Third—That there is now no school house in said school district.

"Fourth—That there are about sixty children of school age in said school district.

"Fifth—That the respondent John Hutchins is the treasurer, the respondent W. O. Ogden is the director, and the respondent Sullivan Hutchins is the moderator of said school district, and that, collectively, the respondents constitute the school board of said district.

"Sixth—That the intervenor, William Westlake, is a resident and taxpayer of said school district.

"7th—That there now is, and ever since prior to June 1, 1890, has been, in the county treasury of Cass county, to the credit of said school district, as a building fund, the sum of about \$780.

"Eighth—That at the annual school meeting, in said

school district, in June, 1890, the electors of said school district authorized the board of directors to build a new school house on the old site, 24x26 feet, with 12 foot posts, directing said board of directors to finish said school house in workmanlike manner, to put a good, substantial stone foundation under said new school house, and to paint the house, but that said electors did not specify the quality of material to be used in said building, except the foundation, and did not specify how much money should be expended in building said school house, nor did the said electors appropriate any money for the purpose of such building. That at said meeting the electors of said district authorized the board to sell the old school house at auction, which has been done, and also voted that eight months' school should be taught in said district the ensuing year.

"Ninth—That on the 11th day of July, 1890, the intervenor herein applied to the Hon. S. M. Chapman, judge of the district court of Cass county, for an injunction restraining the respondents herein from expending any of the funds of said school district, or from creating any debt for the purpose of erecting a school house in said district, until authorized thereunto as provided by law. Said judge granted a temporary restraining order as prayed, but the proof fails to show that the same, or any injunction in said cause, is now in force.

"Tenth—That at a special meeting held in said school district on the 7th day of August, 1890, called for the purpose of voting upon the appropriation and expenditure of money of said district for the purpose of building a school house in said district, the board of directors were, by a majority vote of the electors present and voting, directed not to expend any money for the purpose of building a new school house on the old site, and a majority of the electors of said district present and voting refused to appropriate any money of said school district for the purpose of building a school house on the old site.

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"Eleventh—That at a special meeting held in said school district on the 3d day of September, 1890, for the purpose of voting upon a proposition as to how much money should be expended by said district for the purpose of building a school house, the following proceedings were had: One ballot was taken by said electors on said proposition, but upon discovering that two ballots, folded together as one, had been voted, no count was made, and a second ballot ordered, which was taken, resulting in 29 ballots being cast for the proposition and 26 against the proposition, which result was read by the teller, but not announced by the chairman; that immediately upon the reading of the result of said ballot it was claimed by many electors present that more ballots had been cast than there were voters at said meeting, whereupon the chairman ordered all voters voting "Yes" upon such proposition to arrange themselves in one line, and all voters voting "No" to arrange themselves in another line; that the voters present at said meeting then did so arrange themselves in separate and distinct lines and were counted over twice by the moderator, the chairman, and as a result of said count it was found that 26 were standing in each line, whereupon the moderator, who did not stand in either line, declared the vote a tie, and further declared that he would vote "No," and that the proposition was lost by a vote of 27 voting "No" to 26 voting "Yes." Another ballot was demanded, but before the same could be taken or ordered, a motion to adjourn was made and carried.

"Twelfth—That the director, in making up a record of the said special meeting of September 3, 1890, recorded the result of the second ballot as shown by the count of the tellers.

"Thirteenth—That the relator on the 5th day of September, 1890, made a demand on the respondents to build a school house in said district, which demand was refused by respondents.

"Fourteenth—That this action was brought by agreement between the relator and the respondents John Hutchins and W. O. Ogden."

The relator has filed exceptions to the sixth finding, on the ground that there is no testimony to support it. Objections are also made to the eleventh finding, as not being supported by competent evidence.

The first exception must be overruled, as there is testimony tending to sustain the finding. The second exception is also overruled for the following reasons:

The testimony shows that at the special meeting held on the 3d day of September, 1890, that on the second ballot taken by a teller the vote stood twenty-nine for the proposition to twenty-six against; that immediately upon the reading of the result by the teller it was alleged that more votes had been cast than there were voters present, whereupon the chairman counted the voters in favor of and against the proposition by placing the voters in separate lines and found the vote a tie. He then voted "No," as he had a right to do, and the proposition was defeated.

It is insisted with much earnestness that as the school district records show a majority in favor of the proposition, such records must control in this case and that evidence *aliunde* is not admissible to vary or contradict them. The circumstances leading up to the final determination of a case may always be shown for the purpose of establishing the invalidity of the final adjudication. This rule was applied in *Frazier v. Miles*, 10 Neb., 109. Thus it may be shown that the judgment was entered too soon. (*Johnson v. Baker*, 38 Ill., 98; *Sanders v. Rains*, 10 Mo., 770; *Williams v. Bower*, 26 Id., 601; *France v. Evans*, 90 Id., 74; *Palmer v. McMaster*, 8 Mont., 186; *Glover v. Holman*, 3 Heisk. [Tenn.], 519; 12 Am. & Eng. Ency. of Law, 147r.) It certainly may be shown what the actual facts are as to the result of the several ballotings.

It is evident that more votes were cast, as taken by the

 Phenix Ins. Co. v. Grimes.

teller, than there were voters present. Such being the case it was the duty of the presiding officer to take the necessary steps to secure a correct vote. All free government is founded on the free exercise of an untrammelled ballot, and an honest count of the votes as cast, and this rule runs through every department where the matter is to be determined by popular vote. It is evident that a majority of the voters of the district did not authorize the erection of a school house, and therefore the writ must be

DENIED.

THE other judges concur.

PHENIX INS. CO. V. J. C. GRIMES.

[FILED NOVEMBER 5, 1891.]

1. **Insurance: SEVERABLE CONTRACT.** Where in a policy of insurance a separate valuation has been put upon the different subjects of insurance, as \$300 on the dwelling house, \$175 on household furniture, \$75 on barn, \$500 on horses, mules, and colts while in barn or on farm," etc., the contract is severable and not entire and indivisible.
2. ———: ———: **CONSIDERATION: HOW STATED.** In such case the consideration for insurance on the house might be stated in the policy as a separate item, so of the consideration for the household furniture, barn, horses, mules, and colts, and the stating of the aggregate of these sums in the policy as the consideration instead of the items separately does not make the contract indivisible and entire.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

S. P. Davidson, for plaintiff in error, cited, contending that the contract was entire: *Cuthbertson v. Ins. Co.*, 96 N. Car.,

33	340
54	550
55	264

480, 487; *Hinman v. Ins. Co.*, 36 Wis., 159, 169; *Schumitsch v. Ins. Co.*, 48 Id., 26, 30; *Plath v. F. Ins. Ass'n*, 23 Minn., 479; *Garver v. Ins. Co.*, 69 Ia., 202, 204; *Bowman v. Ins. Co.*, 40 Md., 620, 632; *Biggs v. Ins. Co.*, 88 N. Car., 141; *Russ v. Ins. Co.*, 29 Up. Can., Q. B., 73; *Havens v. Ins. Co.*, 111 Ind., 90, 96, 97; *Gottzman v. Ins. Co.*, 56 Pa. St., 210; *Agri. Ins. Co. v. Montague*, 38 Mich., 548, 551; *Barnes v. Ins. Co.*, 51 Me., 110; *Lovejoy v. Ins. Co.*, 45 Id., 472; *Hartshorne v. Ins. Co.*, 50 N. J. L., 427; *Hathaway v. Ins. Co.*, 64 Ia., 229; *Brunswick Sav. Inst. v. Ins. Co.*, 68 Me., 313; *Lee v. Ins. Co.*, 3 Gray [Mass.], 583; *Kimball v. Ins. Co.*, 8 Id., 34, 38; *Brown v. Ins. Co.*, 11 Cush. [Mass.], 280; *Moore v. Ins. Co.*, 28 Gratt. [Va.], 508.

A. M. Appelget, contra, cited: *Clark v. Ins. Co.*, 6 Cush. [Mass.], 342; *Howard v. Ins. Co.*, 3 Denio [N. Y.], 301; *Manley v. Ins. Co.*, 1 Lans. [N. Y.], 20; *Stetson v. Ins. Co.*, 4 Mass., 330; *Com. Ins. Co. v. Spankneble*, 52 Ill., 53; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St., 289; *Atna Ins. Co. v. Tyler*, 16 Wend. [N. Y.], 385; *Ayres v. Ins. Co.*, 17 Ia., 176; *Scanlon v. Ins. Co.*, 4 Biss. [U. S.], 511; *State Ins. Co. v. Schreck*, 27 Neb., 527.

MAXWELL, J.

This is an action upon a policy of insurance to recover for the death of a colt. On the trial of the cause a jury was waived and the cause tried to the court, which found in favor of the defendant in error and rendered judgment for the value of the animal. The cause was submitted to the court upon the following stipulation of facts: "It is agreed by and between the parties plaintiff and defendant, that this policy was issued by the defendant to the plaintiff; that on or about the 16th of July, 1888, the loss occurred, a colt belonging to the plaintiff was killed by lightning on the land described in the policy, which land had been

Phoenix Ins. Co. v. Grimes.

sold and conveyed by the plaintiff to a third party some time in March, 1888, but that the plaintiff was still in possession thereof; that he was the owner of the land at the time the policy was issued; that the colt was of the value of \$60 at the time it was killed; that on the 20th of July, 1888, the plaintiff gave notice to S. F. Holmes, the agent of the insurance company; that on the 28th of July, 1888, the plaintiff made proofs of loss, now offered in evidence and marked 'Plaintiff's Exhibit B'; that no part of the personal property was incumbered, nor had the title thereof been transferred in any way; that the amount of loss or any part of it has not been paid, nor has the premium or any portion thereof been repaid or tendered to plaintiff.

"The buildings described in the policy are situated upon said land which had been conveyed by plaintiff in March, 1888; that a receipt of the proofs of loss in July, 1888, was the first notice defendant had of said conveyance of the said property; that the paper now offered in evidence marked 'Defendant's Exhibit A,' is the original application in pursuance of which the policy sued on was issued.

"It is further agreed that at the time of the loss plaintiff was the owner of five horses, mules, and colts."

The policy of insurance is as follows:

"No. 0221426.

\$1,300.

"By the policy of insurance the Phoenix Insurance Co., of Brooklyn, N. Y., in consideration of cancellation of policy No. 065622 and $\frac{65}{100}$ dollars cash and the payment at maturity of eleven dollars, for which the insured hereafter named has executed a certain promissory note or obligation of even date herewith, and payable of the 1st day of January, 1887, do insure J. C. Grimes against loss or damage by fire or lightning to the amount of thirteen hundred dollars, as follows:

"\$300 on one story, shingle roof, frame building while occupied by assured, as dwelling No. 1 (including foundation, cellar, or basement walls).

"\$175 on household furniture, useful and ornamental, family wearing apparel, printed books, plate and plated ware, paintings and engravings and their frames (in case of loss no one to be valued at more than cost), sewing machines, trunks, canes, umbrellas, family supplies and fuel, while contained in dwelling No. 1.

"\$75 on shingle roof frame barn No. 1 (including foundation).

"\$50 on shingle roof frame granary.

"\$200 on grain in granaries, or in barns, or in cribs, or in dwelling, or in stacks on cultivated land, not over \$75 on any one stock.

"CLASSIFICATION OF ANIMALS.

"\$300 on horses, mules, and colts (class 1), while in barn or on farm, and against lightning while on or off premises.

"\$200 on cattle (class 2), while in barn or on farm, and against lightning while on or off premises.

"It is hereby expressly provided and mutually agreed, and it is made one of the considerations upon which this contract is based, that in case of loss or damage to any animal the limit of claim upon this company shall be the amount produced by dividing the total amount insured upon the class to which the animal belongs (as above classified), by three-fourths of the total number of animals of such class owned by the assured at the time of the loss or damage, it being understood, however, that in no case (except in the case of more valuable animals insured specially hereunder by names or numbers) shall this company be liable for more than \$100 on any one horse, mule, or colt, \$50 on any one head of cattle, \$5 on any one sheep, or \$10 on any one hog, nor in any case for more than the actual cash value of the animal destroyed or damaged.

"Situated (except as otherwise provided) on, and confined to, premises now actually owned and occupied by the assured, to-wit, 80 acres, section N. E. $\frac{1}{4}$ 35, township 4, range 11, Johnson county, Nebraska.

"And the Phoenix Insurance Company hereby agrees to make good unto the assured, his executors, administrators, or assigns, on receipt of proof, satisfactory to the company, at its Chicago office, all such immediate loss or damage (at the time of loss) not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the above described property, as shall happen by fire or lightning to the property so specified from the 26th day of April, 1886, at 12 o'clock at noon, to the 26th day of April, 1889, at 12 o'clock at noon.

"But it is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any promissory note or obligation, given for the premium, remains past due and unpaid.

"This insurance is based upon the representations contained in the assured's application of even number herewith on file in the company's office in Chicago, Illinois, each and every statement of which is hereby specifically made a warranty and a part hereof; and it is agreed that if any false statements are made in said application, this policy shall be void; or if the assured shall have, or hereafter accept, any other insurance on the above mentioned property, whether valid or not, or if the above mentioned buildings be or become vacant or unoccupied, or be used for any other purpose than is mentioned in said application, without consent indorsed hereon, or if the property shall hereafter become mortgaged or incumbered, or upon the commencement of foreclosure proceedings, or in case any change shall take place in the title, possession, or interest of the assured in the above mentioned property, or if the assured shall not be the sole and unconditional owner in fee of said property, or if this policy shall be assigned, or if the risk be increased in any manner except by the erection and use of ordinary out-buildings, without consent indorsed hereon, then, in each and every one of the above cases, this policy shall be null and void.

"The use of gasoline or other light products of petroleum for lighting, heating, or cooking is prohibited, and will render this policy void without consent indorsed hereon. Kerosene oil may be used for lights.

"In case the assured fails to pay the premium note, or order, at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note or order remains unpaid after its maturity, and no legal action on the part of this company to enforce payment shall be construed as reviving the policy. The payment of the premium, however, revives the policy, and makes it good for the balance of its term.

"No agent or employe of this company, or any other person or persons, have power or authority to waive or alter any of the terms or conditions of this policy, except only the general agent at Chicago, Illinois, and any waiver or alteration by him must be in writing.

"In case there shall be any other insurance upon the property hereby insured, whether valid or not, the assured shall recover of this company only such proportion of the loss as the sum hereby insured thereon shall bear to the whole amount of insurance.

"The company reserves the right to cancel this policy, or any part thereof, by tendering to the assured the unearned premium, less any policy and survey fee that may be included in the consideration; and the assured may cancel where the premium or note, or obligation given for such premium, has been actually paid in cash, in which case the company shall retain the expense of obtaining and writing the risk, and the customary short rates from the date of the policy up to the time it is received at the Chicago office of the company for such cancellation.

[On the margin:] "Mortgage of \$500 permitted.

"In case of loss or damage, the assured shall forthwith give notice of said loss, in writing, to the company. The assured shall, if required, submit to an examination, or

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examinations, under oath, by any person appointed by the company, and subscribe to such examination when reduced to writing. Any difference arising under this policy in case of loss may be settled by arbitration, each party to select one arbitrator, and the two chosen, in case of disagreement, to select a third, and their award in writing shall be binding as to the amount of loss only, the cost of arbitration to be borne by the parties hereto equally. If this policy is made payable in case of loss to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property covered, consented to as required by the conditions of this policy.

"No suit or action against this company shall be sustainable in any court of law or chancery unless commenced within six months next after such loss shall occur, any statute of limitation to the contrary notwithstanding.

"In witness whereof, the Phoenix Insurance Company have caused these presents to be signed by their president and attested by their secretary in the city of Brooklyn, county of Kings, N. Y., but the same shall not be binding until countersigned by T. R. Burch, general agent for the company, at Chicago, Illinois.

"STEPHEN CROWELL,
President.

"PHILANDER SHAW,
Secretary.

"Countersigned at Chicago, Ill., this 26th day of April,
1886.

— — —,
"General Agent."

The principal error relied upon by the insurance company for a reversal of the judgment is the sale and conveyance of the real estate on which the insured property was kept, there being no notice given to the company of such transfer.

It is claimed that the contract of insurance, although it covers several distinct items of property specified in the

policy, yet the consideration being single and entire, therefore a violation of any part of the policy renders the whole void.

There are many cases holding that where the premium for the insurance is a gross sum, and the policy covers different classes of property, the contract is indivisible, and if void as to one class, is void as to all. Hence, as the defendant in error had insured the buildings on the farm, and afterwards sold the farm without consulting or notifying the insurance company, that therefore the policy was avoided as to the personal property covered by the policy. The objection to this class of decisions is that they are based on a false assumption of facts. Thus, a certain amount of insurance is placed on the dwelling house, a specified amount on the barn, and on several descriptions of personal property. In case of loss of the farm buildings or any item of personal property, the recovery cannot exceed the amount of insurance stated in the policy on that particular class or description of property, although the aggregate of values of the different items of insurance might greatly exceed that sum. Thus, suppose a policy is made for \$5,000, of which sum \$1,000 was placed on the dwelling house, \$500 on the barn, and the remainder on certain items of personal property named. In case of the destruction of the house by fire, the company would be liable for \$1,000 and no more; and if the barn was burned, the liability could not exceed \$500. So in case of the destruction by fire of any other piece of property insured, the company is liable only for the amount of insurance on that and not for the full amount named in the policy, unless all the property insured is destroyed.

It will thus be seen that the contract consists of separate and distinct parts and covers many subjects. The consideration for these several items might properly be stated separately in the policy, but for convenience the aggregate of the several sums alone is given. This does not make an

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entire and indivisible contract of the policy. The contracts are severable as to each class, and one piece of property is not dependent on another. This question was before this court in 1889, in *State Ins. Co. v. Schreck*, 27 Neb., 527. That cause was carefully considered, and it was held, in effect, that the contract was severable, and that the execution of a mortgage upon the realty would not prevent a recovery for loss of the personal property. The provision in the policy in that case was substantially the same as in the one under consideration. We are entirely satisfied with the carefully prepared opinion of Chief Justice REESE in that case, and it will be adhered to. (See also *German Ins. Co. v. Fairbank*, 32 Neb., 750.) This disposes of the errors relied upon, and the judgment is

AFFIRMED.

THE other judges concur.

33	348
37	898
33	348
43	427

E. W. OSBORN v. J. E. SHOTWELL.

[FILED NOVEMBER 5, 1891.]

1. **Justice of the Peace: BILL OF EXCEPTIONS: IN AN ACTION OF FORCIBLE ENTRY AND DETENTION** the statute expressly authorizes the taking of "exceptions to the opinion of the justice," and he has authority to sign the same.
2. ———: ———: **CHANGE OF VENUE.** Where a defendant files an affidavit for a change of the place of trial, which is refused, all the evidence on that matter before the justice must be preserved in a bill of exceptions, duly signed by him, to predicate error thereon in the district or supreme court.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

P. O. Cassidy, for plaintiff in error, cited, contending that a bill of exceptions was not necessary: *Belcher v. Skinner*, 28 Neb., 91; *Freeman v. Burks*, 16 Id., 328; *Cook v. Hester*, 21 Id., 369; *U. P. R. Co. v. Smerah*, 22 Id., 751.

Sawyer & Snell, *contra*, cited: Change of venue; *Maxwell's Justice Prac.*, 49; *Bank of Cleveland v. Ward*, 11 O., 128; *Davis v. Rivers*, 49 Ia., 435; *Hall v. Barnes*, 82 Ill., 228; *Sloan v. Smith*, 3 Cal., 410; *People v. Wright*, 5 How. Pr. [N. Y.], 23.

MAXWELL, J.

This is an action of forcible entry and detention. On the trial of the cause before the justice, judgment was rendered in favor of the defendant in error. The case was taken on error to the district court, where the judgment of the justice was affirmed. The transcript of the justice is as follows:

"September 9, 1889, plaintiff filed the following complaint:

"The plaintiff complains of the defendant for that one Wm. L. Minthing was in his lifetime the owner of the N. E. $\frac{1}{4}$ of section 27, in township 12, range 7, in Lancaster county, Neb., and that this plaintiff is the administrator of his estate, said Minthing being dead; that as administrator plaintiff leased said premises to the defendant on the 1st day of March, 1889, for one year, but said defendant has neglected, failed, and refused to execute a chattel mortgage to secure the deferred payment in conformity with the terms of said lease, and said lease has become wholly determined null and void, and plaintiff has often demanded possession of said premises from defendant. The plaintiff is entitled to the immediate possession of the said property, but the defendant forcibly and unlawfully detains posses-

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sion of the same from the plaintiff. On the 4th day of September, 1889, plaintiff served a notice in writing on said defendant to leave said premises. Plaintiff asks restitution of said premises and costs of suit.

“(Signed)

J. E. SHOTWELL.

“Dated this 9th day of September, 1889.

“N. E. MELICK,

“Justice of the Peace.

“Subscribed and sworn to before me, N. E. Melick, justice of the peace in and for Lancaster county, Nebraska, this 9th day of September, 1889.

“N. E. MELICK, J. P.

“In Justice Court, before N. E. Melick, J. P., Lancaster County, Nebraska.

“J. E. SHOTWELL }

“^{v.}
E. W. OSBORN. }

“I, E. W. Osborn, do on oath say that I cannot obtain a fair and impartial trial of the above cause before said justice of the peace, because of the bias of said justice of the peace, as affiant verily believes.

“(Signed)

E. W. OSBORN.

“Subscribed and sworn to before me, by the said E. W. Osborn, the 14th day of September, 1889.

“N. E. MELICK,

“Justice of the Peace.’

“Indorsed: ‘J. E. Shotwell v. E. W. Osborn. Affidavit for a change of venue. Filed this 14th day of September, 1889. N. E. Melick, justice of the peace.’

“On September 9, 1889, I issued summons for E. W. Osborn, made returnable at 8 o'clock A. M. September 14, 1889, and gave same to A. B. Norton, constable.

“September 14, 1889, 8 o'clock A. M. Summons returned indorsed as follows:

“Received this summons the 9th day of September, 1889. I served the within writ on the within named E. W. Os-

Osborn v. Shotwell.

born by giving to him personally a true and certified copy of the same with all the indorsements thereon.

“(Signed)

A. B. NORTON,

“ ‘Constable.’

“On case being called parties appeared in person and by their attorneys, Sawyer & Snell, for plaintiff, and Cassidy & Wolfe, for defendant. Thereupon defendant filed an affidavit asking for change of venue on account of bias of the justice before whom the case was to be tried, a copy of which is hereto attached. Defendant’s attorneys admit at the same time that there were really no grounds for the affidavit. Plaintiff introduced in evidence the proceedings in this case previously had to show bearing on bias of justice. Motion for change of venue overruled, on ground that the justice was not biased, to which defendant excepts.

“The complaint being read to defendant he refused to plead thereto, on which, and in his behalf, I entered a plea of not guilty. The defendant stated that he should take no part in the proceedings. The plaintiff introduced in evidence a written lease between plaintiff and defendant, executed on the 1st day of March, 1889, also notice given defendant on September, 1889, by plaintiff requiring defendant to vacate premises in dispute, also evidence in relation to chattel mortgage that defendant refused to execute.

“After hearing the evidence in the case, I find that the allegations in the complaint are true, and that the defendant is guilty as charged in said complaint. It is therefore considered and adjudged by me that the plaintiff have restitution of the premises described in said complaint, and that he recover of said defendant the costs of this action, taxed at \$5.95.”

There is no bill of exceptions, and it is contended on behalf of defendant in error that there is no authority for the justice to sign such bill.

Section 1030 of the Code provides, in cases of forcible entry and detention, that “Exceptions to the opinion of

the justice, in cases under this chapter upon questions of law and evidence, may be taken by either party, whether tried by a jury or otherwise; or either party may appeal from the judgment rendered by such justice by giving bond, with two responsible sureties to be approved by the justice, conditioned, if the plaintiff appeals, to satisfy the final judgment and costs; if the defendant appeals, to satisfy the final judgment and costs, and pay a reasonable rent for the premises during the time he wrongfully withholds the same."

The right of appeal was given by the act of 1883. Prior to that time the only mode of review was by proceedings in error. Exceptions are to be preserved in a bill duly signed by the justice; otherwise it would be impossible for a reviewing court to know with certainty what exceptions had been taken. The right to take exceptions clearly implies the right to have the same preserved in a bill to be authenticated by the signature of the justice. The justice, therefore, had authority in a case of this kind to sign a bill of exceptions. There was no bill in this case and nothing to show that the affidavit in question was all the evidence before the justice. Hence the judgment cannot be disturbed.

Second—Section 958a of the Code provides "That in all civil and criminal proceedings before justices of the peace, any defendant in such proceedings may apply for and obtain a change of venue, by filing an affidavit in the case made by the defendant, his agent or attorney, stating that the defendant cannot, as affiant verily believes, have a fair and impartial hearing in the case on account of the interest, bias, or prejudice of the justice, and by paying the costs now required to be paid by defendant on change of venue for the causes and in the cases mentioned in chapter four of title thirty, part two, of the Revised Statutes, and thereupon the proceedings shall be transferred to the nearest justice of the peace to whom the said objec-

tions do not apply, of the same county, to be proceeded with in the manner pointed out for the transfer and procedure in cases on change of venue for cause mentioned in said chapter four."

These sections no doubt have been productive of much reckless swearing. In many cases, where the oath is made and filed for a change of the place of trial, the justice must know that there is no substantial ground for the oath, and yet he is required to make the change where the terms provided by law as to costs have been complied with. It is not for him to say whether or not he is biased, nor is it necessary to establish bias before a change can be ordered. All that is necessary is for the defendant, his agent or attorney, to make oath that the "defendant cannot, as affiant verily believes, have a fair and impartial hearing in the case on account of the interest, bias, or prejudice of the justice," and paying the costs now required of the defendant by section 958, the place of trial must be changed.

It is stated in the transcript that "defendant's attorney admitted at the same time, when oath for change was made, that there were really no grounds for the affidavit." If this is true, then the oath was a deliberate falsehood and the application would not be made in good faith. Where such is the case, there could be no error in overruling the application. The change is granted to secure an impartial tribunal. If the defendant does not believe that the justice before whom the action is pending is biased or partial, then in taking a false oath he clearly commits perjury. If this statement was made as claimed, it would be sufficient to justify the overruling of the motion.

There is no bill of exceptions, and we have no means of knowing what evidence was before the justice, and therefore cannot hold that he erred in his judgment. The judgment is therefore

AFFIRMED.

THE other judges concur.

GEORGE BROWN V. STATE OF NEBRASKA.

[FILED NOVEMBER 5, 1891.]

Robbery: CHARGE OF, WILL SUSTAIN A CONVICTION OF LARCENY FROM PERSON. Section 13 of the Criminal Code provides that "If any person shall forcibly, and by violence, or by putting in fear, take from the person of another any money or personal property of any value whatever, with the intent to rob or steal, every person so offending shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the penitentiary not more than fifteen nor less than three years." This section took effect in 1873. In 1887 the legislature passed an act which declares that "Every person who steals property of any value by taking the same from the person of another without putting said person in fear by threats or the use of force and violence, shall be deemed guilty of grand larceny, and shall, upon conviction thereof, be punished by confinement in the penitentiary for not less than one nor more than seven years." *Held*, That the charge of robbery includes the offense of stealing from the person without force and violence or putting in fear, and that under an information for robbery the accused may be convicted of stealing from the person.

ERROR to the district court for Douglas county. Tried below before CLARKSON, J.

J. L. Kaley, for plaintiff in error, cited, contending that on an information drawn under sec. 113a, Criminal Code, the accused could not be convicted of robbery: 2 Bishop, *Crim. Law*, sec. 1166; 1 Wharton, *Crim. Law*, sec. 854; 2 Archibald, *Crim. Prac. & Pl.*, 1290; *Shinn v. State*, 64 Ind., 13; *McCloskey v. People*, 5 Parker, *Crim. Rep.* [N. Y.], 305.

George H. Hastings, *Attorney General*, *contra*, cited, as to the definition of larceny: 2 East, *P. C.*, 553; *Hickey v. State*, 23 Ind., 21. Robbery is a form of compound larceny: 2 Bishop, *Crim. Law.*, 757; *Hickey v. State*, 23

33	354
34	448
35	354
42	598
33	354
52	354

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Ind., 21. A charge of robbery will sustain a conviction of larceny: *Stevens v. State*, 19 Neb., 647; 2 Bishop, Crim. Law, 1156; 1 Wharton, Crim. Law, secs. 846, 856; *State v. Arnold*, 31 Neb., 75.

MAXWELL, J.

The plaintiff in error was found guilty of grand larceny, and sentenced to imprisonment in the penitentiary for two years. The errors assigned relate to the giving and refusing certain instructions. The information is as follows:

"Of the May term of the district court of the third judicial district of the state of Nebraska, within and for the county of Douglas and state of Nebraska, in the year of our Lord 1890.

"I, Timothy J. Mahoney, county attorney in and for the county of Douglas, in said state of Nebraska, who prosecutes for and in behalf of said state, in the district court of said district sitting in and for said county of Douglas, and duly empowered by law to inform of offenses committed in said county of Douglas, come now here, in the name and by the authority of the state of Nebraska, and give the court to understand and be informed that on the 6th day of May, A. D. 1890, George Brown, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being, did then and there in said county, in and upon one Mrs. Anna M. Kervan, unlawfully, forcibly, and with violence make an assault, and her the said Mrs. Anna M. Kervan in bodily fear then and there feloniously did put, and from the person and against the will of her the said Mrs. Anna M. Kervan then and there feloniously, forcibly, and by violence did steal, take, and carry away one pocketbook of the value of \$1.50, and eighty-five cents lawful money of the United States of the value of eighty-five cents, all being of the value of \$2.35, the property of the said Mrs. Anna M. Kervan, with the intent then and there to steal,

take, and carry said property away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

Section 13 of the Criminal Code provides: "If any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, every person so offending shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the penitentiary not more than fifteen nor less than three years."

Section 113a provides: "Every person who steals property of any value by taking the same from the person of another without putting said person in fear by threats or the use of force and violence, shall be deemed guilty of grand larceny, and shall, upon conviction thereof, be punished by confinement in the penitentiary for not less than one nor more than seven years."

The court instructed the jury as follows:

"In order to convict the defendant of a robbery you must be satisfied from the evidence, beyond a reasonable doubt, of the truth of the following propositions:

"First—That he took the property described in the information, or some part of said property, from the person of Anna M. Kervan.

"Second—That such taking was done by force and violence or by putting said Anna M. Kervan in bodily fear.

"Third—That such taking was done by defendant with the intent to feloniously rob said Anna M. Kervan and to steal said property, take it away, and convert the same to his own use and against the will and without the consent of the said Anna M. Kervan.

"Fourth—That Anna M. Kervan was the owner of said property so taken, that it had some value, and that the taking was in Douglas county, Nebraska, and on or about said 6th day of May, 1890.

"Should you find from the evidence, beyond a reasonable doubt, that each and every of the foregoing propositions are true, it is your duty to convict of robbery as charged in the information.

"Seventh—It is permissible under this information, if in your opinion the evidence justifies and warrants you in so doing, to find the defendant guilty of larceny from the person. The putting in bodily fear, or the use of force and violence, is not a necessary element in the crime of larceny from the person, but the felonious taking and carrying away from the person, with the intent to convert property to his own use and against owner's consent, are necessary."

The plaintiff asked the following instruction, which was refused:

"The jury are instructed that if you find from the evidence that the defendant took the property described in the information from Anna M. Kervan, against her will, but did not first put said Kervan in fear, and did not use any force or violence, except such as constitutes the sudden snatching of said property from said Kervan, you will not be warranted in finding the defendant guilty as charged in the information, but may find him guilty of larceny."

The question of the validity of sec. 113a was before this court in *State v. Arnold*, 31 Neb., 75, and the statute sustained. The latter statute was passed to reach the case of pickpockets, who, prior to the passage of the act, had comparative immunity from punishment. (*State v. Arnold, supra.*) Robbery is the felonious and forcible taking from the person of another goods or money of value by violence, or putting in fear. (4 Blacks. Comm., 243; 2 Bouv. Law Dict., 488.) The crime of stealing from the person is not as heinous a crime as that of robbery, but it possesses some of the elements of robbery; in other words, it is of the same nature but does not go as far as robbery. To the extent of taking from the person of another money or other valuable things, both offenses are alike and both are

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punishable in the penitentiary. The crime of robbery certainly includes the crime of stealing from the person, and where such is the case, the jury may find the accused not guilty of the higher offense and guilty of a less one.

There was no error, then, in giving and refusing the instructions referred to. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

PETER OLSON V. ELLA PETERSON:

[FILED NOVEMBER 5, 1891.]

1. **Bastardy: DEGREE OF EVIDENCE REQUIRED.** In a prosecution for bastardy a preponderance of the evidence is sufficient to justify a conviction, and the defendant may be found guilty upon the unsupported evidence of the complainant.
2. ———: **REVIEW.** *Held*, That there was no error in the charge of the court, and that the instructions denied were properly refused.
3. ———: **EVIDENCE: AN OFFER OF COMPROMISE** made by a defendant in a bastardy proceeding, not accepted, is not admissible in evidence. The rule does not exclude the admission of particular facts tending to show guilt.
4. ———: ———: **MARRIAGE.** Where the complainant has testified that she was unmarried at the beginning of the action, it is proper to prove, on cross-examination, any fact or circumstance tending to show that she was married when the suit was instituted.
5. ———: ———. Testimony that the complainant had sexual intercourse with men other than the defendant, outside the period of gestation, is inadmissible to evidence.

ERROR to the district court for Saunders county. Tried below before MARSHALL, J.

33	358
39	219
33	358
50	227
33	358
62	871a
62	427a

Good & Good, for plaintiffs in error, cited, as to degree of evidence required: *Reg. v. Armitage*, 27 L. T. [Eng.], 41; 2 Am. & Eng. Ency. Law, p. 146; *Saunders*, Affiliation [8th Ed.], 55; 2 Best, Ev., sec. 621, and cases; 1 Whart., Ev., sec. 414; *Rez v. Roberts*, 2 C. & K. [Eng.], 614; *Hodges v. Bennett*, 5 H. & N. [Eng.], 625; *Queen v. Read*, 9 A. & E. [Eng.], 619. Offer to compromise: *Home Ins. Co. v. Baltimore*, 93 U. S., 527; *Batchelder v. Batchelder*, 2 Allen [Mass.], 105; *Saunders v. McCarthy*, 8 Id., 42; *Harrington v. Lincoln*, 4 Gray [Mass.], 563; *Gay v. Bates*, 99 Mass., 263; *Durgin v. Somers*, 117 Id., 55; *Draper v. Hatfield*, 124 Id., 53; *Williams v. Thorp*, 8 Cow. [N. Y.], 201; *Paulin v. Howser*, 63 Ill., 312; *Barker v. Bushnell*, 75 Id., 220; *State Bank of Wis. v. Dutton*, 11 Wis., 371. Marriage of prosecutrix: *Gibson v. Gibson*, 24 Neb., 430; *State v. Walker*, 13 Pac. Rep. [Kan.], 285; 2 Best, Ev., sec. 349; 2 Kent's Com., 87, and cases; 2 Greenl., Ev., secs. 461-2; *Harmon v. Harmon*, 16 Ill., 85; *Miller v. White*, 80 Id., 580; *Sharon v. Sharon*, 16 Pac. Rep. [Cal.], 360-1; *Gall v. Gall*, 21 N. E. Rep. [N. Y.], 106.

G. W. Simpson, and *J. R. Gilkeson*, *contra*, cited, as to degree of evidence: *Altschuler v. Algaza*, 16 Neb., 633; *Kennedy v. State*, 42 N. W. Rep. [Wis.], 213. Offer to compromise: *Dodge Co. v. Kemnitz*, 28 Neb., 224; *Moore v. State*, 2 O. St., 500; *Pratt v. State*, 19 O. St., 277; *Perkins v. Mobley*, 4 O. St., 668. Exclusion of testimony as to other acts: *Sang v. Beers*, 20 Neb., 373; *Masters v. Marsh*, 19 Id., 460.

NORVAL, J.

This is a case of bastardy, by which it is sought to charge the plaintiff in error with being the father of a bastard child of Ella Peterson, the prosecutrix. To the complaint the defendant pleaded not guilty. At the close of the trial the jury returned a verdict of guilty. The

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defendant's motion for a new trial was overruled, and the court adjudged that the defendant was the reputed father of said child, and that he should stand charged with its future maintenance in the sum of \$825. To reverse the judgment the defendant prosecutes error.

Complaint is made because the court refused to give the following instruction to the jury, requested by the defendant:

"Before you can find a verdict of guilty in this case, the plaintiff must show, by a clear preponderance of the evidence, that the defendant is the father of the child, and this proof must not only be given by her direct and positive testimony, but by some corroborative evidence in some material particular, apart from her own testimony."

No error was committed in refusing this request, as it did not correctly state the rule of evidence. In a prosecution for bastardy the guilt of the defendant is only required to be established by a preponderance of the evidence. The statute makes the mother of a bastard child a competent witness in a proceeding like this, leaving to the jury the question of her credibility. If the evidence of the complainant shows the accused to be the father of the child, it may be sufficient to sustain a verdict of guilty, although her testimony is uncorroborated by other evidence. (*Alt-schuler v. Algaza*, 16 Neb., 631; *State v. Nichols*, 29 Minn., 357; *State v. McGlothlen*, 56 Ia., 544.)

On the trial it was contended by the defendant that the complainant is a married woman. The defendant introduced testimony tending to show that in the latter part of the month of July, 1888, the plaintiff, and one Andrew Anderson, went to a restaurant and boarding house in the city of Wahoo and engaged board and lodging, representing themselves as husband and wife. They remained there two or three months, sustaining, during the time, the relation of husband and wife, and held themselves out to the public as such. Anderson abandoned the plaintiff and

left her at this restaurant in September. The plaintiff testified that she was never married, and never told any one that she was the wife of Andrew Anderson. If her testimony is to be believed, her cohabitation, with him was not lawful, but illicit. No marriage ceremony or solemnization is claimed, but it is insisted that the facts proven as to the relations existing between the complainant and Anderson, constitute a common law marriage. It was for the jury to determine from the entire testimony what were the real relations this man Anderson sustained toward the plaintiff, and whether or not they were married. The jury, by the verdict, found that the plaintiff was an unmarried woman, and there is testimony to support the finding.

The point is made that this issue was not fairly presented to the jury by the charge of the court. The court, over the defendant's objections and exceptions, gave the following instructions to the jury on that branch of the case:

"Sixth—The jury are instructed that marriage in its legal sense may be defined to be a civil contract; and that it is not indispensable that a clergyman or magistrate should be present to authorize, solemnize, or confirm the contract to give validity to the marriage. Therefore, if there is a contract to be continued during life entered into between a man and a woman legally capable of entering into a marriage relation, and then this contract is followed by the parties thereto in good faith, cohabiting together as man and wife, this amounts to a valid marriage, and is not voidable at the will of either party. Cohabit does not mean mere sexual indulgence, but it means a dwelling together as husband and wife. Marriage, as distinguished from the agreement to marry, and from the act of becoming married, is the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other, and the community, of the duties legally incumbent on those whose association is founded on the distinction of sex. Marriage does not mean a mere tem-

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porary agreement to dwell together for a time for the gratification of sexual or lustful desires, but it is essential that the contract be entered into with a view to its continuance through life, and then be followed by celebration and cohabitation, with the apparent object of continuing such cohabitation through life.

“Seventh—The jury are instructed that if from the evidence in this case they believe that the plaintiff, Ella Peterson, and one Andrew Anderson in good faith entered into a contract to become husband and wife, and in good faith and in pursuance of that contract cohabited, that is, dwelt together as husband and wife, and so held themselves out to those with whom they associated, and that they, in good faith to each other and the community, entered upon the discharge of the duties legally incumbent on those holding to each other the relation of husband and wife, then the jury should find that the plaintiff is a married woman. On the other hand, if the jury from the evidence believe that the plaintiff and said Andrew Anderson merely lived together without any contract to marry, or for the mere purpose of gratifying their sexual desires, or for any temporary purpose, then, although they may have slept together, and called each other husband and wife, such living together, standing alone, would not in a legal sense constitute a marriage, and in that event she would not be considered a married woman.”

These instructions were rightfully given, as in our opinion they fairly express the law governing the facts and are applicable to the testimony in the case. They are not in conflict with the rule announced and applied in *Gibson v. Gibson*, 24 Neb., 394, but are in perfect harmony with the opinion in that case and the authorities cited therein.

It is further claimed that the court erred in refusing to give the defendant's third request, which reads:

“You are instructed that if you find from the evidence adduced that said plaintiff and Andrew Anderson lived

together as man and wife, demeaning themselves toward each other as such, and were treated by their friends and acquaintances as being entitled to that status, for the period of about three months during July, August, and September of 1888, the law presumes them to have been legally married, and in such case you must acquit the defendant."

While it is true marriage may be established by cohabitation, reputation, declaration, and conduct of the parties, yet it will not be conclusively presumed from such facts. The complainant and Anderson may have lived and cohabited together and held themselves out to the world as husband and wife, and yet if there was no mutual agreement between the parties to assume that relation, and it was not their intention to do so, then no marriage existed between them. The fault with the defendant's request to charge is that it holds, if certain facts are found to exist, a marriage is conclusively proved, while the existence of such facts only raises the presumption of marriage, but not a conclusive presumption.

As there was no complaint in the motion for a new trial because of the refusal of the court to give the defendant's fourth request, the assignment of error based thereon cannot be considered.

Exception is taken because the court permitted the plaintiff to prove, on the cross-examination of the defendant, that, while the action was pending in the district court, he offered the complainant a certain sum of money in settlement of the case. The rule is that an offer or proposition of settlement of matters in litigation, not accepted, is not admissible in evidence for or against either party. The rule does not exclude the admission of particular facts. A litigant has the right to buy his peace, and the law will not allow him to be prejudiced by the fact that he made a proposition to the other party to effect a settlement, which was rejected. (*Kierstead v. Brown*, 23 Neb., 595; *Sherer v. Piper*, 26 O. St., 476; *Sebree v. Smith*, 16 Pac. Rep. [Idaho], 915;

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L. & N. A. R. Co. v. Wright, 16 N. E. Rep. [Ind.], 145; *State Bank v. Dutton*, 11 Wis., 389; *Barker v. Bushnell*, 75 Ill., 220; *State v. Lavin*, 80 Ia., 555.)

Counsel for defendant in error concede in their brief that such is the rule in purely civil cases, but contend that it has no application in actions like the one at bar. A prosecution for bastardy is in the nature of a civil action. The statute in express terms authorizes the complainant in such a proceeding, while the complaint is pending before the justice, to settle with the defendant. The agreement, however, must be acknowledged by both parties before the justice, who is required to enter a memorandum thereof upon his docket, and the defendant must give a bond to save the county from all liability for the support of the child. Whether the power to compromise exists, after the defendant has been recognized by the justice to appear before the district court, so that the settlement would constitute a bar to a further prosecution of the case, we are not now required to determine. The defendant, doubtless, supposed that the right to settle existed. He certainly did not violate any law in making overtures to the complainant for the purpose of effecting a settlement. So far as appears it was made in good faith for the purpose of avoiding litigation, even though the sum offered was small, and we know of no reason why his rejected proposal should be regarded as an admission that he was the father of complainant's child. Had the offer been accepted by her, and the defendant given his note for the sum agreed upon for the support of the child, its collection could be enforced at law. The object of the statute is to compel the father of a bastard child to provide for the support of the child and to protect the public against all liability for such support. A fair compromise made between the parents of an illegitimate child providing for the maintenance thereof, is highly commendable, and such a settlement is in harmony with the policy of our statutes. The establishing of the rule for

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which the defendant in error contends would tend to prevent the settlement of such matters.

The case of *State v. Lavin, supra*, is precisely like this. There the court ruled that an offer of compromise made by a defendant in a bastardy proceeding is not an admission of his guilt and is inadmissible in evidence. We are of the opinion, both upon principle and authority, that error prejudicial to the plaintiff in error was committed by the trial court in allowing the proposition, made for the purpose of compromise, to be proven.

The court refused to permit counsel for plaintiff in error to cross-examine the complainant as to the relations sustained between her and one Andrew Anderson. One of the issues in the case was whether or not the complainant was unmarried when the prosecution was instituted. It was the theory of the defense, on the trial, that she was married to Anderson. On direct examination she testified that she was never married. It was certainly competent to prove on cross-examination any fact or circumstance which had a tendency to show that she was a married woman at the time of bringing the action. The court refused to permit the complainant to answer on cross-examination whether or not she and the man Anderson did not live together as husband and wife and represented themselves to others as being such. This was error.

There is no merit in the objection made to the exclusion of the depositions. They were offered to prove that the prosecutrix had sexual intercourse with men other than the defendant outside of the period of gestation. Such evidence was inadmissible. (*Masters v. Marsh*, 19 Neb., 458; *Sang v. Beers*, 20 Id., 365.)

For the errors referred to the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ALBERT LIVINGSTON ET AL., APPELLANTS, v. M. V.
COREY, APPELLEE.

[FILED NOVEMBER 5, 1891.]

1. **Liquors: License: Application: Signers After Publication of Notice.** After a petition for a liquor license was filed with the city clerk and notice thereof was given, the city council permitted other freeholders to sign the petition. *Held*, No error, and that it was not necessary to republish the notice after such amendment.
2. ———: ———: ———: **THE EVIDENCE** examined, and *held*, that the application for a license was signed by the requisite number of qualified petitioners.
3. ———: ———: **APPLICANT DISQUALIFIED BY PRIOR VIOLATION OF LAW.** Where, on the hearing of a remonstrance against the granting of a liquor license, it is satisfactorily proven that the applicant has, within a year, sold intoxicating liquors to a minor, or has, during the same period, sold adulterated liquors, the applicant is not entitled to a license.
4. ———: ———: ———: **PROOF.** Such violations of the law may be established by the records of a court showing the conviction of the applicant, or by any other competent evidence.
5. ———: ———: **THE OBJECTION** that there was no ordinance in force authorizing the granting of a saloon license, cannot be raised for the first time in the supreme court.

APPEAL from the district court for Clay county. Heard below before MORRIS, J.

Thos. H. Matters, for appellants, cited: *Goodwin v. Smith*, 37 Am. Rep. [Ind.], 144; *State v. Bennett*, 19 Neb., 207; *State v. Weber*, 20 Id., 467; *State v. Kaso*, 25 Id., 609; *State v. Hartfel*, 24 Wis., 60.

Leslie G. Hurd, *contra*, cited: *O'Dea v. Washington Co.*, 3 Neb., 122; *Struthers v. McDowell*, 5 Id., 494; *State v. Russell*, 17 Id., 203; *Burley v. Millard*, 11 Id., 289; *Foster v. Devinney*, 28 Id., 416.

NORVAL, J.

On the 11th day of April, 1890, M. V. Corey, the appellee, filed in the office of the city clerk of the city of Harvard his petition for license to sell malt, spirituous and vinous liquors in the first ward of said city, for the municipal year ending April 30, 1891. On the date fixed in the notice for hearing the application the appellants filed with said clerk a remonstrance against the issuance of the license. By agreement of parties the matter was heard April 30, when, after hearing the testimony, the city council overruled the remonstrance and granted the license. An appeal was taken by the remonstrants to the district court, where the decision of the city council was affirmed.

The case is before us on appeal. It is a question whether, in the absence of a statutory enactment providing for appeals from the district court to the supreme court in proceedings like this, the proper remedy is not by petition in error; but, as the appellee has not filed a motion to dismiss, we will not now decide the point.

The petition, when filed, was signed by thirty-four persons claiming to be resident freeholders of the first ward of the city of Harvard. A notice of the filing of the same was published in the *Harvard Courier* for more than two weeks prior to the date named for the hearing. After the notice was given, and the remonstrance was filed, the council allows the petitioner to amend his petition by permitting Let Webster, L. L. Chambers, and Catherine Douse to sign their names to the application. The appellants claim that the council had no jurisdiction to act upon the petition thus amended, for the reason no notice was given of the amendment. This cannot be. The council acquired jurisdiction by the filing of a proper petition and the giving of the notice required by the provisions of section 2 of chapter 50 of the Compiled Statutes, and having once obtained jurisdiction, they did not lose it by allowing

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other persons to sign the petition, nor was it necessary to republish the notice after such amendment was made, any more than it would be essential to issue and serve a summons in a civil action after the filing of an amended petition. We have no doubt that the council had the power to permit the amendment to be made. After the petition was filed, three of the petitioners presented to the council a written request that their names be taken off the petition, and two of the other signers removed from Harvard after signing the petition. The amendment was certainly in furtherance of justice. Doubtless the appellants could have, if they so desired, filed an additional remonstrance. They were not taken by surprise, as the hearing did not take place until two days after the names were added to the petition, besides no further time was asked in which to prepare for trial.

The case of *Pelton v. Drummond*, 21 Neb., 495, cited by appellants, is not in conflict with the views above expressed. It was there ruled that the authorities have no power to take any action on a petition for a liquor license until the statutory notice has been given. We adhere to the rule there stated, but whether such notice must be republished after new names are added to the petition was not involved nor considered in the precedent cited.

The petition was signed by the requisite number of qualified petitioners. It bore the names of thirty-seven persons, counting the three names which were added. It was admitted on the trial that G. W. Updike and W. R. Martin were non-residents of the city of Harvard. It also appears that A. L. Kaufman was not a freeholder, and that Miles Wilson, A. A. Keller, and Conrad Miller, who signed the petition, filed a written request withdrawing as petitioners. The undisputed testimony shows that all the other signers were qualified petitioners, so that after deducting the six names mentioned, there remained thirty-one signers, who were resident freeholders of the first ward

of the city of Harvard, or one more than the statute requires. The petition was, therefore, sufficient.

The remonstrance alleges that M. V. Corey had violated the law during the preceding year by selling liquors to minors. Section 8 of said chapter 50 prohibits the sale of malt, spirituous, and vinous liquors, or any intoxicating drinks, to any minor under twenty-one years of age, and section 3 of the same chapter provides that "If it shall be satisfactorily proven that the applicant for license has been guilty of the violation of any of the provisions of this act within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license."

The testimony of Frank Gill, a minor seventeen years old, is to the effect that he obtained a glass of beer at Corey's saloon, either of Mr. Corey or of his bartender, Miller, on Christmas night preceding the hearing before the city council. There is also testimony tending to prove that one Sherman Dunn, a minor, bought and drank intoxicating liquors at appellee's saloon within a year prior to April 30, 1890. M. V. Corey denies under oath, that either Gill or Dunn procured liquor at his place of business to his knowledge. William Miller, the bartender, testified that he could not say whether he sold any beer, whisky, or liquor to Gill or not, but he fails to deny making the sale to Dunn. The testimony is not conflicting. The positive testimony of the witnesses produced by the remonstrators, as to liquors being procured in appellee's saloon by Gill and Dunn, not having been denied by Miller, who tended bar, the charge of selling liquors is well supported by the evidence, and, for that reason, the license should have been denied.

Another ground of the remonstrance was that the petitioner violated the law by selling adulterated liquors. The disposing of such liquors, by gift or sale, is forbidden by section 13 of the liquor law.

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The proof shows that a pint of whisky which was sold by the appellee on the 24th day of April, 1890, to one Bradford Stone, was placed in the hands of Dr. Martin Clark, a chemist of Sutton, for analysis. Dr. Clark testified that he analyzed the pint of liquor, and had found that it contained common sugar and fusel-oil, and three and one-half grains of charcoal and tannate of iron; that the charcoal and tannic acid could have been produced by the liquor standing for some time in the barrel, but that the iron was an extraneous product. We quote from the testimony of the chemist as to the existence of fusel-oil in the sample analyzed, as follows:

Q. Now you say there was fusel-oil in it. Is not that an incident of distillation?

A. It is one of the products of distillation. It is especially in all crude whisky, it is found in large proportions in raw whisky, and also in high wines. It gradually disappears by aging of the whisky. In double-distilled goods there should be none.

Q. In redistillation, they take it out, do they not?

A. If the distillation is stopped at the right time, there would be none.

Q. Then all whiskies, except of the redistilled grade, have fusel-oil in them?

A. Yes; the first distillation would have fusel-oil.

Q. Was the quantity of fusel-oil in this sample that you analyzed, such as to lead you to suppose it had been introduced, or that it was as it came from the process of distillation?

A. I should think it was from the process of distillation; I should think it was as it came from the still.

The witness further testified that the sample given him for analysis had been thinned by water; that sugar was not to be found in pure whisky, and that fusel-oil was poisonous. It was the opinion of the chemist that the liquor had been adulterated.

We are satisfied from the testimony of the chemist that the liquor sold by appellee to Bradford Stone was adulterated, and his testimony was not contradicted by any other evidence taken at the hearing. True, Mr. Corey's testimony is to the effect that he did not adulterate the whisky, nor did any one else so far as he knew, yet that could make no difference. He was bound to know, at his peril, that the liquors were pure. The statute makes a person liable who, intentionally or innocently, sells or gives away adulterated liquors. Quite likely the fusel-oil was in the liquor when it left the still, yet it is likewise clear that the sugar, water, and the iron sediment were subsequently added. This constituted an adulteration, within the meaning of the statute. Proof that the appellee had violated the law in selling liquors to minors, or in selling adulterated liquors, was not confined to the record of a court showing his conviction, but on the hearing of a remonstrance against granting a license it may be proven, by any competent evidence, that the applicant has been guilty of any of the provisions of the law relating to the sale of liquors.

It is stated in brief of counsel for appellants that there was no law in force in the city of Harvard granting authority to the mayor and council to grant the license. This question was not raised by the remonstrance nor by the evidence, and will not be considered here. Parties protesting against the granting of a license must fairly present their objections to the council. The question of authority not having been made before the city council, it was not necessary to put in evidence the ordinances of the city authorizing the granting of license to saloon-keepers.

Complaint is also made by appellants in the brief of counsel that the findings of the district court are insufficient. Whether the judgment was based upon sufficient findings or not is immaterial, the case being here on appeal upon the merits. Appellants recognized the validity of the judgment by appealing.

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Complaint is made of the overruling, by the city council, the motion of the remonstrants to compel the petitioner to first introduce his testimony. In *Lambert v. Stevens*, 29 Neb., 283, in speaking of the burden of proof in proceedings like this, we said: "When the remonstrance denies any matter necessary to confer jurisdiction upon the granting power, as that certain signers to the petition are not freeholders, the burden is on the applicant to establish that they are qualified petitioners. When the remonstrance sets up new matter, as that certain signers to the petition were made freeholders for the purpose of signing the same, or that the applicant has been guilty of a violation of any provision of the liquor law within a year, or that any former license has been revoked, the burden is upon the remonstrators to establish such new matter." It therefore follows, from the logic of that opinion, that the burden was upon the appellee to establish that the persons signing the petition, who the remonstrance avers were not qualified petitioners, were in fact resident freeholders of the ward. Likewise the burden was upon the remonstrators to prove that the petitioner sold adulterated liquors and sold liquors to minors. The appellee should have first introduced his evidence upon the question of the qualification of the petitioners, but his failure to do so is not sufficient ground for reversal. The error was waived by taking an appeal from the decision of the city council to the district court. The appeal required a decision upon the merits, and was not a proceeding to review errors made by the council on the hearing of the remonstrance.

The order of the city council granting the appellee a license and the judgment of the district court affirming the same are reversed, the remonstrance is sustained, and the application for a license is denied.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOHN D. THOMAS V. SYLVIA E. THOMAS ET AL.

[FILED NOVEMBER 5, 1891.]

1. **Res Adjudicata: HOW PLEADED.** The party relying upon a former adjudication as a defense must aver in his answer in what court the judgment was rendered, and plead facts showing that the recovery was upon the same subject-matter and between the same parties, or their privies, as the suit in which the defense of *res adjudicata* is made, and that the judgment is in full force.
2. ———: ———. The failure to allege when the former adjudication was had will not invalidate the plea, although it is good ground for a motion to make more definite and certain.
3. ———: **THE ANSWER** construed, and *held*, to state sufficient facts to constitute a bar to the action.
4. **Fraud: AVOIDING JUDGMENT: PLEADING.** In order to avoid a judgment on the ground of fraud in obtaining it, the facts constituting the fraud must be pleaded and proved.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Bradley & Delamatre, for plaintiff in error.

Cowin & McHugh, *contra*.

NORVAL, J.

From a judgment rendered in favor of the defendants in the court below the plaintiff prosecuted an appeal to this court. At the January term, 1890, the cause was submitted upon two motions, one to quash the bill of exceptions, and the other to dismiss the appeal. Both motions were sustained; the former, because the bill of exceptions was not prepared, served, nor allowed within the time required by law, and the latter, on the ground that the appeal was not taken within six months from the rendition of the

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judgment appealed from. Although the appeal was dismissed, the transcript was retained, and the plaintiff was permitted to file a petition in error. Subsequently, the cause was again submitted for decision upon the errors assigned in the petition in error.

This suit was instituted in the district court by John D. Thomas against Sylvia E. Thomas, Carrie L. Behm, and John F. Behm, the purpose and object of which was the cancellation of a deed of certain real estate situated in Douglas county, made by the plaintiff to said John F. Behm, which, it is alleged, was procured by certain false and fraudulent representations of the defendants. The fraudulent representations are set out in the petition with great particularity, but their repetition here is not necessary to a proper understanding of the question presented.

The defendants answered denying each and every allegation of the petition, and, as a further defense, answered as follows:

"And said defendants, further answering said petition, say that the issue here joined has been heretofore tried in said court between said parties, and has been finally adjudicated in favor of said defendants; and said defendants further say that the judgment rendered in favor of said defendants still stands in full force, and is *res adjudicata*; and said defendants therefore plead the same in bar of this action."

No reply was filed. Upon the trial the court found that the defense of *res adjudicata* was sustained by the evidence, and dismissed the action.

It is urged by counsel for plaintiff in error that the plea of former adjudication is insufficient to support the judgment. It is safe to state that the general rule deducible from the decisions is, a judgment of a court having jurisdiction of the parties and the subject-matter is a complete bar, as to the question therein litigated, to a subsequent

suit between the same parties, or their privies. The party relying upon a former adjudication as a defense must aver, in his answer, in what court the judgment was rendered and plead affirmative facts, showing that the recovery was upon the same subject-matter, and substantially between the same parties as the suit in which the defense of *res adjudicata* is made, and that the judgment is in full force. Tested by this rule, the answer in the case at bar states a complete defense. It shows that both suits were brought in the same court, were between the same parties, involved the same issue; that judgment was rendered in the former action in favor of the answering defendants, and that said adjudication was in full force.

Fault is found with the answer because it fails to allege when the former adjudication was had. While in the approved forms of the plea of *res adjudicata*, found in the various works on pleading, the date when the judgment was rendered is given, yet we have been unable to find a single authority, and none has been cited by counsel, which holds that the plea is bad, in substance, if the date of the judgment is not pleaded. Had the precise date been averred, the allegation would have been more specific, and had a motion been made to require the defendants to make their answer more definite and certain in that respect, it would have been well taken; but the objection cannot be raised for the first time after trial and judgment. The objection to the sufficiency of the answer is overruled.

Considerable is said in the brief of plaintiff about the former judgment being obtained by fraud, and numerous authorities are cited to sustain the proposition that where fraud has been practiced by the successful party in obtaining an adjudication, the judgment is void and constitutes no bar to another action. A sufficient answer to this part of the brief is that no such question is presented by the record. The facts constituting the fraud should have been set up in a reply to the answer. As no reply was filed, the

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allegations of the answer must be taken as true. The judgment is

AFFIRMED.

THE other judges concur.

GEORGE A. HOAGLAND, APPELLEE, v. LUSK BROS. ET AL., APPELLANTS.

[FILED NOVEMBER 5, 1891.]

1. **Mechanics' Liens: PARTNERSHIP.** A partnership composed of three persons erected a building upon a lot owned by two of the partners. The partners holding the legal title of the lot, contracted in the name of the firm for the materials used in the construction of the building. In an action by the material-man to foreclose his lien it was *held*, that the lien attached to the lot and building thereon.
2. —: **NOT WAIVED BY TAKING DEBTOR'S NOTE.** A mechanic's lien is not lost nor waived by the taking of the note of debtor for the balance due on their account, nor in such case by giving to the latter a receipt as in full for the demand.
3. —: **ACCEPTANCE OF COLLATERAL SECURITY.** The acceptance by a material-man of a note and chattel mortgage as collateral security for materials, previously furnished for the erection of a building under a contract with the owner is not a waiver of the lien of the material-man, unless such was the intention of the parties.

APPEAL from the district court for Saline county. Heard below before MORRIS, J.

Hastings & McGintie, for appellants:

If security and note are taken expressly as payment, a lien for the account is lost, notwithstanding the statute. (*McCoy v. Quick*, 30 Wis., 521; *Crooks v. Finney*, 39 O. St., 57; *Rose v. Persse*, 29 Conn., 256; 2 Jones, Liens,

33	376
37	678
33	376
49	171
42	882
43	901
33	376
51	785

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1518, 1519.) Security accepted as payment waives the lien. (*Kinzey v. Thomas*, 28 Ill., 502; 2 Jones, Liens, 1518, 1519.)

**Dawes & Foss*, and *Palmer & Hendee*, *contra*, cited: *Wheeler v. Plattsmouth*, 7 Neb., 279; *Webster v. Wray*, 17 Id., 581; *Wilson v. Beardsley*, 20 Id., 451; *Stadleman v. Fitzgerald*, 14 Id., 293.

NORVAL, J.

This suit was brought in the court below by the appellee to foreclose a mechanic's lien. Cross-petitions were filed by E. I. Ferguson and the Combination Gas Machine Company. A decree of foreclosure was entered which gave E. I. Ferguson a first lien for the sum of \$2,566.87, and the plaintiff a second lien for the sum of \$363.64. The cross-petition of the Combination Gas Machine Company was dismissed. The defendant Henry S. Ferguson appeals from so much of the decree as allowed to plaintiff a mechanic's lien.

The appellant insists that the plaintiff was not entitled to a mechanic's lien because the materials were not furnished under any contract with the owner of the premises. The materials were sold by the plaintiff to Lusk Bros. & Co. for the construction of a brick building upon lot 146, in the town of Friend. The firm consisted of Abner P. Lusk, William S. Lusk, and Joseph G. Boynton. At the time the materials were sold and delivered the Lusks were the owners of the lot. The materials were furnished and the building erected with the knowledge and consent of the owners of the legal title of the lot. In fact the undisputed evidence is that the Lusks personally contracted for the material on behalf of the firm. This was sufficient to subject their interest in the property to the operation of the mechanic's lien.

Did the appellee, prior to the purchase of the premises

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by the appellants, release all right and claim to a lien? On October 30, 1887, the defendant E. I. Ferguson loaned to Abner P. and William S. Lusk \$2,250 on sixty days time, and as security for the payment of the same took a mortgage on the lot. At that time the building was nearly completed and plaintiff was entitled to file a lien in the sum of \$680.32, the same being the balance due for materials furnished, but had not yet done so. Ferguson refused to pay out the money on the loan with the plaintiff's right to a first lien still existing. After some negotiations the plaintiff finally agreed that on the payment of \$250.32, and on Lusk Bros. & Co. giving their note for \$430, he would accept the same and release his right to claim a lien prior to the mortgage. The money was paid over out of the proceeds of the loan, and the note was executed and delivered on November 2. The plaintiff gave a receipt in full of the account and relinquished all right of lien on the property. This receipt was delivered to Ferguson at the time he paid the money to B. F. Rengler, the manager of the plaintiff's business at Friend, who executed the receipt on behalf of the plaintiff. The receipt being either lost or misplaced, it could not be produced at the trial. While Rengler's testimony is to the effect that he did not give such a paper, the evidence to the contrary is overwhelming.

It is obvious that E. I. Ferguson having made the loan on the property on the faith of the plaintiff's agreement to waive or relinquish his right to a lien, the plaintiff could not afterwards be permitted to assert it to the prejudice of said mortgagee. The giving to Mr. Ferguson the first lien for the amount due on his mortgage, clearly indicates that the trial court applied the doctrine of equitable estoppel. Manifestly this was right and proper. We are satisfied from a careful perusal of the evidence that it was not the intention of any of the parties that the plaintiff, by the giving of the receipt, relinquished all right to claim a

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lien, but that his lien, when acquired, should be postponed to Ferguson's mortgage. The plaintiff's account for materials furnished was not paid in full, a note being taken for a part thereof. Neither the accepting of the note, nor the giving of the receipt as in full payment for the demand, was an abandonment of his right to perfect a lien. (*Van Court v. Bushnell*, 21 Ill., 624; *Brady v. Anderson*, 24 Id., 110; *Goble v. Gale*, 7 Blackford [Ind.], 218; *Paddock v. Stout*, 13 N. E. Rep. [Ill.], 183; *Jones v. White*, 12 S. W. Rep. [Tex.], 179.)

The doctrine of estoppel cannot be invoked in favor of the appellant Henry S. Ferguson, for the obvious reason that there is not a line of testimony to show that he was induced to take a deed of the property by reason of the giving of the receipt by the plaintiff, or that the grantee in the deed had any knowledge that such a receipt was ever given, nor was he in any manner led to believe from any act of the plaintiff that it was the intention upon the plaintiff's part to waive or relinquish his lien. While on the other hand the plaintiff's sworn statement of lien being upon record when the deed was made, the purchaser was chargeable with notice thereof, and the title thus acquired was subject to plaintiff's rights in the property.

In January the firm of Lusk Bros. & Co. failed. At that time the plaintiff took a note executed by William S. Lusk, secured by chattel mortgage on some potatoes, as collateral security of the plaintiff's claim. The potatoes were subsequently sold under the mortgage and the proceeds applied towards the payment of the plaintiff's demand. The note and chattel mortgage were not accepted by the plaintiff as payment, but simply as additional and collateral security, without any intention to waive the lien given by statute. The taking of the security did not affect the lien. Upon this proposition there is an irreconcilable conflict in the authorities. The rule which we have stated is, we think, sustained by the better reason. (*Ford v. Wilson*, 11

 Warren v. Raben.

S. E. Rep. [Ga.], 559; *Howe et al. v. Kindred*, 44 N. W. Rep. [Minn.], 311; *Hinchman v. Lybrand*, 14 Serg. & R. [Pa.], 32; *Montandon v. Deas*, 14 Ala., 33.) The judgment of the district court is

AFFIRMED.

THE other judges concur.

33	380
34	118
33	380
55	218

N. H. WARREN & Co., APPELLANTS, v. JOHN RABEN,
APPELLEE.

[FILED NOVEMBER 11, 1891.]

1. The contract between the parties, set out at length in the opinion, construed and applied to the evidence.
2. Reference. The decision of the case requiring the examination of a long and involved account, reference is made to an expert for that purpose.

APPEAL from the district court for Hamilton county.
Heard below before TIFFANY, J., sitting for NORVAL, J.

Hainer & Kellogg, for appellants, cited, as to the account: 2 Perry, Trusts, p. 474, sec. 821; *Blauvelt v. Ackerman*, 23 N. J. Eq., 495; *Albertson v. State*, 9 Neb., 431; Taylor, Ev., 344; Powell's Ev., 294; 1 Greenl., Ev., sec. 79; *Christy v. Douglas*, Wright [O.], 485; Abbott, Trial Ev., 461; 1 Wait, A. & D., 193-4; *Langdon v. Roane*, 6 Ala., 518. As to the construction of the contract: 2 Pom., Eq. Jur., p. 480-2, secs. 957, 958; Story, Agency, sec. 210; *Cutron v. Shepherd*, 8 Neb., 315, 316; *Masters v. Freeman*, 17 O. St., 323; *May v. Babcock*, 4 O., 334; *Sch. Dist. v. Estes*, 13 Neb., 53; *Harbach v. Miller*, 14 Id., 13.

A. W. Agee, *contra*, cited, as to the construction of the contract: 2 Parsons, Contracts, 547, 548, 550; *Greenstine*

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v. Borchard, 50 Mich., 434; *Harvey v. Cady*, 3 Id., 431; *Brown v. Smith*, 11 Reporter [N. Y.], 510; *Hinnemann v. Rosenbach*, 39 N. Y., 100; *Long v. R. Co.*, 50 Id., 76; *Wiggin v. Goodwin*, 63 Me., 389; *Ripley v. Paige*, 12 Vt., 353; *Fitchburg v. Lunenburg*, 102 Mass., 358; *Elliott v. Weed*, 44 Conn., 19; *Cockburn v. Alexander*, 6 M., G. & C. [Eng.], 814; *Kirk v. Hartman*, 63 Pa. St., 97; *McCormick v. Huse*, 66 Ill., 315; Wharton, Contracts, 658; Abbott's Trial Ev., 485; *Blackmer v. Davis*, 10 Reporter [Mass.], 365; *College v. Charlesworth*, 54 Mich., 523; *Olson v. Ins. Co.*, 29 N. W. Rep. [Minn.], 125; *Barney v. Newcomb*, 6 Cush. [Mass.], 56. As to what are profits: *Jones v. Davidson*, 2 Sneed [Tenn.], 447; *Andrews v. Boyd*, 5 Greenl. [Me.], 203; *People v. Supervisors*, 4 Hill [N. Y.], 23; *Masterton v. Mayor of Brooklyn*, 7 Id., 62; *Shea v. Donahue*, 15 Lea [Tenn.], 160; Lindley, Partnerships, 791, 806.

COBB, CH. J.

The appellants are a commission firm of grain dealers at Chicago, Illinois, and were owners of a grain elevator at Aurora, in this state, which the appellee leased and operated under a joint contract with the owners and on their joint account.

The contract was made October 20, 1883, between Nathan H. Warren, Cyrus T. Warren, and Charles C. Warren, composing the firm of N. H. Warren & Co., party of the first part, and John Raben, of Aurora, Nebraska, party of the second part; and the same "witnesseth, that for and in consideration of the agreement hereinafter set forth, the party of the first part agrees to furnish the free use of their horse-power elevator, fully equipped and ready for use, located at Aurora, Nebraska, to the said party of the second part. The said party of the second part agrees, in consideration of the free use of said elevator, to furnish all capital necessary to carry on and properly handle the grain business

Warren v. Raben.

at said Aurora, and shipping the grain so bought to said party of the first part, unless it can be sold to better advantage otherwise, the said party of the first part to charge at time of sale the regular commission as fixed by the Chicago board of trade. The said party of the second part agrees to keep a correct and true account and record of all weights, prices, and amounts paid for grain, and of all amounts received for sale of said grain. On or about the 1st day of January of each year the profits arising from such purchase and sale of grain shall be approximately declared, which shall be added to the total amount charged as commission by said party of the first part on said grain, and the amount so found to be equally divided between the party of the first part and the party of the second part, and that on July 1 of each year a final statement of the year's business shall be made upon the same basis as the approximate statement above provided for. It is mutually agreed between the parties hereto that all the necessary repairs amounting to over \$2 in each case shall be made by the said party of the first part, but all lesser repairs shall be made by the party of the second part. It is also mutually agreed that this agreement shall continue from year to year unless notice shall be given on or before the 1st day of May in either year by each party.

"In witness whereof, the parties hereto have set their hands and seal on the day and year last above mentioned.

"(Signed)

N. H. WARREN & Co.

"JOHN RABEN."

The plaintiffs allege that they immediately delivered full possession of their elevator at Aurora to the defendant, furnished and equipped, ready for use, who took possession and transacted therein a large business in buying, selling, shipping, and storing grain from October 20, 1883, until December 2, 1884, when the contract was terminated by mutual consent; that during that time the business at Aurora, by the terms of the contract and the practice of

the parties, was under the sole charge and supervision of the defendant; that during the continuance of the business the defendant shipped to the plaintiffs numerous consignments of grain to be by them sold as provided by their contract, which grain the plaintiffs did so sell, charging therefor the regular commission as fixed by the Chicago board of trade, and duly accounted for such commission so charged, and for the proceeds of sales; and the plaintiffs aver that they have, at all times, performed every act on their part to be performed under the contract, and have paid various drafts for money drawn on them by the defendant on account of the shipment and sales of grain; an account of which is hereto attached, marked Exhibit A.

The plaintiffs allege that although by the contract the defendant was to furnish the capital necessary to carry on and properly handle the grain business at Aurora, and ship all the grain bought by him to them, unless the same could be sold to better advantage otherwise, yet he did, during the continuance of the business, overdraw his account with the plaintiffs more than \$1,000, and while so overdrawn, in violation of his contract and in fraud of the plaintiffs' rights, and to prevent them from receiving the proceeds of the sales of grain sufficient to discharge the amount of his overdraft, failed to ship all grain to them, but, on the contrary, shipped a large number of car loads to W. F. Johnson & Co., commission merchants at Chicago, and to other parties, who had no other or better facilities for selling grain than the plaintiffs had, and who charged the same commissions on sales that the plaintiffs did, which was one cent per bushel, except on barley sold by sample, which was one and one-half cent per bushel; by reason of which the plaintiffs were defrauded of a considerable sum, the exact amount not known.

It is alleged that the defendant failed to keep a correct account of the weights, amounts, and prices paid for grain and that received for sales, and that he shipped to the

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plaintiffs, and to others, large amounts of which no account was kept, or by him rendered to plaintiffs, the exact amount and the proceeds received by him not known; that the accounts of the business were so negligently and carelessly kept by the defendant that its condition and the amounts due the parties respectively cannot be determined therefrom; that the business involved many thousand separate transactions, with nearly as many persons, by defendant in purchasing grain in Aurora and vicinity, and selling to various parties in Chicago, Burlington, Iowa, and Omaha, and in other markets, by reason of the multiplicity of which and the neglect of the defendant to keep correct accounts the business is complicated, and it is impossible to state approximately the amount due the plaintiffs, but it is charged that a large profit was made, the whole of which, together with \$1,199.80, the balance due plaintiffs, by Exhibit A, is in the hands of defendant, converted to his own use; that by the contract the defendant was obliged to render on January 1, yearly, an approximate statement of profits for the preceding year, to which was to be added the total amount of plaintiffs' commissions, the sum total to be equally divided between the parties; and on July 1, yearly, to make a final settlement of the year's business on the same basis, and though both dates have elapsed, and the business closed by mutual consent, the defendant, although urged to do so, has not submitted his accounts, nor any account pertaining to the business, except for repairs, \$452.89, set forth in Exhibit A, and allowed as credit of January 1, 1885; that at the last mentioned date the defendant made a statement of business transactions, November 1, 1883, to January 1, 1885, comprising a summary of

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PROFIT AND LOSS.

Loss on wheat.....	\$3,610 67	Profit on corn	\$2,780 20
Loss on rye.....	22 66	Profit on barley.....	470 68
N. H. Warren & Co.,		Profit on oats.....	274 19
one-half.....	2,397 58	Commissions.....	2,541 15
John Raben, one-half,	2,397 58	Loss and damage claim	
		on wheat, see sale 266..	186 64
		Rebate corn sale 415	1,175 61
		Gain corn option	675 00
		Gain corn option	325 00
	<hr/>		<hr/>
	\$8,428 49		\$8,428 49

The plaintiffs allege that the defendant's statement is incorrect, showing \$48,422.19 expended for wheat and \$44,611.52 received therefor, with net loss of \$3,610.87, when in fact there was expended less than \$45,570, and was received by defendant a sum largely in excess of that represented, and it is denied that there was any loss on wheat; that his account shows \$1,141.30 expended for rye, and \$1,118.64 received therefor, making a loss of \$22.60, when in fact he received \$1,209.81, making a profit of \$74.66; that his account shows \$3,055.05 expended for oats, and \$3,329.24 received therefor, making a profit of \$274.19, when in fact he expended less than the amount stated and received more than that stated and made a profit of more than \$639.

The plaintiffs pray that an account be taken of their business, under their contract, from the commencement to the close, and of the moneys received and paid by the parties respectively; that the defendant may account for all the property, assets, effects, and profits of the business, and for the regular commission established by the Chicago board of trade on all sales of grain wrongfully shipped by the defendant to parties other than the plaintiffs, and that defendant be required by a decree of the court to pay plaintiffs whatever may be found due on such accounting.

Exhibit A is the plaintiffs' account current with defendant, showing the following summary of receipts and disbursements:

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1883.	DR.	
	To total amount of drafts.....	\$97,841 00
Nov. 30,	" interest for Nov., 8 per cent,	34 04
Dec. 31,	" " Dec.....	57 61
1884.		
Jan. 31,	" " Jan., '84.....	33 25
Feb. 29,	" " Feb.....	12 05
March 21,	" protest fees on draft.....	2 56
March 31,	" interest for March.....	13 83
April 30,	" " April.....	9 83
May 31,	" " May.....	7 88
June 30,	" " June.....	16 69
Aug. 19,	" demand note, 12-27-'83.....	1,400 00
Aug. 19,	" " 3-3-'84.....	2,000 00
Aug. 19,	" interest on above notes.....	148 54
Sept. 25,	" demand note, 3-18-'84.....	2,000 00
Sept. 25,	" interest on above note.....	84 88
Sept. 30,	" " for September.....	22 68
Oct. 31,	" " " October.....	62 39
Nov. 17,	" demand note, 1-10-'84.....	1,600 00
Nov. 17,	" " 1-9-'84.....	1,200 00
Nov. 17,	" interest on note, 1-10.....	109 15
Nov. 17,	" " " 1-9.....	83 47
Nov. 24,	" demand note, 2-16-'84.....	1,600 00
Nov. 24,	" interest on above note.....	99 90
Nov. 29,	" interest for November.....	82 91
Dec. 31,	" " December.....	19 72
1885.		
Feb. 19,	" interest to date.....	26 03
		<hr/>
		\$108,569 26

[Across the face in red ink:] (10,727.41.)

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1883.	CR.	
	By total sales	\$92,918 37
Dec. 27,	" demand note, 8 per cent.....	1,400 00
1884.		
Jan. 9,	" demand loan.....	1,200 00
Jan. 15,	" demand note.....	1,600 00
Jan. 21,	" overdraft	998 75
Feb. 16,	" demand note, 8 per cent	1,600 00
March 3,	" demand note.....	2,000 00
March 18,	" demand note.....	2,000 00
April 3,	" demand note.....	1,901 55
July 31,	" interest on account, July, '84..	3 12
Aug. 30,	" " Aug., '84..	7 36
Sept. 1,	" freight on boiler.....	66 40
Sept. 9,	" P. & S. 3,408.....	77 53
Nov. 24,	" P. & S. 4,854.....	675 00
Nov. 24,	" P. & S. 55	325 00
Dec. 1,	" repairs on elevator	452 81
Feb. 19,	" commissions charged,	
	\$2,541 15	
19,	" one $\frac{1}{2}$ profit.....	2,397 58
		143 57
	By balance.....	1,199 80
1885.		\$108,569 26
June 12,	By subsequent sale 1,374	4 50
	Supplemental balance due... ..	\$1,195 30
[Across the face in red ink :] (14,451.09.)		

The defendant answered, admitting the contract set forth and alleging that during all of the time in pursuance of it, and since, he has fully complied with every condition of it, but denies that the plaintiffs have complied with its conditions on their part, and sets up that the plaintiffs, in order to induce defendant to enter into the contract, represented that they had all the facilities necessary to sell, and could,

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and would, sell grain for defendant, in Chicago, for as high a price and to as good an advantage as that of any other commission merchant; and relying on such representations, defendant entered into the contract, when, in fact, such representations were false, and the plaintiffs could not and did not sell the grain shipped to them by defendant at as high a price as other commission merchants would have sold it, but sold the same at a lower price, causing damage and loss, no part of which has been paid.

Defendant denies that Exhibit A is a true statement of accounts, or that it shows all just credits to which he is entitled; denies that the charges against him are true and just, and alleges that the various charges of interest, amounting to \$924.45, the plaintiffs are not entitled to receive or to have any part thereof; that the plaintiffs never had any account or demand against him on which they were entitled to demand or receive interest. He denies that the account shows all the money received by the plaintiffs on account of sales of grain shipped by defendant, and alleges that the plaintiffs have wrongfully deducted from the proceeds of sales various sums for insurance, interest, and storage, amounting to \$879.54, and refuse to pay over to or credit defendant with any part of the money wrongfully deducted from sales of grain shipped as stated, and which the plaintiffs have converted to their own use; that they deducted from the proceeds of sale large sums in addition to that necessary to pay the cost of freight, and have wrongfully converted the same to their own use; that the defendant paid and expended for the use of the plaintiffs, \$388.51, no part of which has been paid or credited to defendant.

Defendant denies that he shipped grain to any other person or persons to prevent the plaintiffs from receiving the same, or their commissions thereon, or that his account with the plaintiffs was overdrawn, or that he was indebted to them in any sum of money, but admits that he shipped a considerable amount of grain to W. F. Johnson & Co.,

commission merchants, at Chicago, and to other persons, as he claimed to have the right to do, under his contract, for the reason that he would thereby sell the same to better advantage and for higher prices than by shipping the same to plaintiffs; and denies that the plaintiffs are entitled to any commissions or profits on grain sold or shipped to any other person; and denies that he has failed to keep a correct account of the weight of grain bought and of the prices and amounts paid therefor, or received by him for the sales of grain, but alleges that he has kept a correct and true account thereof; and denies that any profit was made on the grain bought and shipped to the plaintiffs by defendant, or that he has any money or profit of any kind belonging to the plaintiffs, or in which they have any interest.

During the continuation of the contract the defendant was compelled to expend, in addition to that paid for grain, the sum of \$2,226.75 for shelling corn, and for labor in carrying on the business of buying, handling, cleaning, and shipping the grain bought under the contract, during which time he devoted all his time, labor, and skill to the prosecution of the business, which services were worth \$1,300.

The defendant claims a credit on such account of \$3,526.75, which the plaintiffs wrongfully refuse to give. Defendant has at all times been ready to make a full and fair settlement of all the business transactions of the plaintiffs, and alleges there is due from the plaintiffs to him \$3,000 which they refuse to pay over to defendant.

That under the contract between August 1, 1884, and October 1, 1884, defendant bought and shipped to plaintiffs 20,000 bushels of No. 2 wheat, directing the plaintiffs to sell whenever they could at seventy-eight cents per bushel, the price of which subsequently advanced to eighty-two and one-half cents per bushel, and which could have been sold at that price, and though ordered and requested by defendant to sell, the plaintiffs neglected to do so, and care-

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lessly held the same until the price in the market fell to seventy-four cents per bushel, at which price the wheat was sold, to the damage of defendant \$1,700. By reason of the withholding of the wheat from sale contrary to the instructions of the defendant the plaintiffs were compelled to pay out \$693.31 for storage, which they wrongfully deducted from the proceeds of the sale of wheat, which sum they have wrongfully withheld and converted to their own use; also the further sum of \$104.47 for insurance on the wheat contrary to the orders of defendant, together with the sum of \$81.76 for interest wrongfully charged against defendant, all of which sums the plaintiffs have withheld from the defendant, and have converted the same to their own use.

Defendant denies that he paid for wheat bought and shipped to the plaintiffs, under the contract, a less sum than \$48,422.19, and alleges that the cost, including buying, handling, cleaning, and shipping, was greatly in excess of that sum, and that he has received for the wheat \$44,811.52, and no more, leaving a loss to him of \$3,610.67; and denies that he paid for oats less than \$3,055.05, and alleges that he did pay the sum of \$3,073.95 for the oats shipped under the contract.

After the business had been entered upon, the plaintiffs proposed that the defendant should buy and crib at Aurora a large amount of corn, hold it for a rise in the market and ship it to the plaintiffs, unless disposed of otherwise to better advantage, both parties to share the commissions and profits as upon other grain, and the plaintiffs offered and agreed to furnish the capital to buy, crib, and hold the corn, which offer was accepted, and in accordance with the plaintiffs, proposition a large amount of corn was bought and stored in cribs at Aurora; that at various times plaintiffs applied to defendant to assist them in raising money to pay for the same, and it was agreed, in order to enable plaintiffs to borrow money, that defendant from

time to time should execute his promissory notes to the plaintiffs, and attach them as security for the payment of crib receipts, being receipts for corn then in store at Aurora in possession of defendant. It was agreed that the notes were for the sole purpose of enabling the plaintiffs to use them with the crib receipts attached as collaterals for money borrowed, and whenever the corn covered by the receipts should be shipped to the plaintiffs they should take up the notes and receipts and return them to defendant. In pursuance of the agreement defendant executed to plaintiffs various promissory notes, each so secured, for the various sums mentioned as "demand notes," none of which were in fact loans from the plaintiffs to the defendant, and the plaintiffs are not entitled to charge or receive interest on any of said sums, which were wholly for the accommodation of the plaintiffs to enable them to borrow money as stated. Among the same was one for \$1,901.55 credited to the defendant in plaintiffs' account dated April 3, 1884, described as "demand loan, 8 per cent," which was delivered to the plaintiffs with crib receipt for corn in defendant's possession at Aurora. After the delivery of the note and crib receipt to plaintiffs, defendant shipped all the corn mentioned and included in the receipt to the plaintiffs, who sold the same, and on April 3, 1884, received from the sale, after paying all freight and other expenses of shipping and handling the same, a sum more than sufficient to pay the note, and retained the same, applying it to the payment of the note, and credited defendant on said day with \$1,901.55 on account of the note, and never accounted for the proceeds of the sale in any other manner. The plaintiffs have charged defendant with all the money received by him for any purpose and the sum of \$1,901.55 is included, though the same has been fully paid, and was used in buying and cribbing corn shipped to the plaintiffs and sold by them, and the proceeds, after paying the note, was converted to their own use. The plaintiffs still retain

the note in possession and refuse to surrender it to defendant.

Defendant did not, on January 1, 1885, or at any other time, make to the plaintiffs a statement of the condition of the business under the contract as alleged, but now asks that an account be taken of the business done under the contract and of the moneys received and disbursed by the parties in the conduct of the business; that the plaintiffs be compelled to account for all the proceeds of the sale of grain shipped by the defendant, and for the loss sustained on wheat shipped by defendant by reason of the negligence and carelessness of the plaintiffs and their refusal to follow the instructions of the defendant as to the sale of the same; that the plaintiffs be decreed to cancel and surrender the note for \$1,901.55; and to pay any sum which may on an accounting be found due to defendant.

The plaintiffs replied denying each and every allegation of the answer, excepting such as are expressly admitted in the petition by them in this cause.

There was a trial to the court, a jury having been waived, on June 7, 1887, and the court having taken the cause under advisement, on June 18, 1888, the court found in favor of the defendant and that there was due from the plaintiffs to the defendant the sum of \$2,611.99 on account of the transactions between the parties under the contract of October 20, 1883, for which sum judgment was rendered, and from which the plaintiffs appealed to this court.

The cause having been tried by the district court without a jury, we are not informed from the record what construction was placed upon the terms of the contract by the trial court, except in so far as a construction may be inferred from the judgment. And this from the multifarious character of the controversy is not clearly indicated; certainly not sufficiently to relieve the court of the duty of declaring its legal interpretation. In this duty, I am impressed of the conviction that the intention of the parties

to the contract is not literally expressed by its terms. First, the plaintiffs are to furnish defendant the free use of their elevator at Aurora, in consideration of defendant's furnishing all capital necessary to carry on and properly handle the grain business at Aurora and shipping the grain so bought to the plaintiffs. In addition to this, it seems clearly the intention of the parties that by means of the capital to be furnished by the defendant from time to time, as required in the business, and the necessary men and animals to be employed by him, he should carry on the business of buying grain, elevating, and shipping it to Chicago, with all other incidental acts necessary to the carrying forward of such business; that the employment of this capital and its management were to be taken as the consideration for the use of the elevator. The capital employed was to remain the property of Raben as the elevator remained the property of N. H. Warren & Co., the use of either being for the purposes of the *quasi*-partnership formed by the contract between the parties. The plaintiff's object was twofold: First, in the profit of buying grain at Aurora and consigning it to them at Chicago, using their own elevator as capital and labor for that purpose; second, to increase their business as commission merchants at Chicago, of receiving grain and selling it on the board of trade of that city. The defendant's object was to have the necessary facilities for handling, elevating, and shipping grain at Aurora, as well as to insure the safety and advantageous disposal of shipments to be consigned to an experienced and responsible firm of grain dealers in Chicago. It is provided that all grain bought should be shipped to the plaintiffs "unless it could be sold to better advantage otherwise, the plaintiffs to charge at time of sale the regular commission as fixed by the Chicago board of trade," and that the defendant should "keep a correct and true account and record of all weights, prices, and amounts paid for grain, and of all amounts received for sale of grain;" that on

January 1 of each year the profits arising from the purchase and sale of grain shall be approximately prepared, to be added to the total amount charged as commissions by the plaintiffs, and the amount be equally divided between the parties; that on July 1 of each year a final statement of the year's business shall be made upon a like basis for settlement between the parties.

It will scarcely be questioned that it was the intention that all grain purchased under the contract, if shipped to Chicago for sale, should be consigned to the plaintiffs, for undoubtedly they possessed facilities for selling at the highest market price and on the most advantageous terms. But the contract did contemplate and provide a condition of exemption in the words "unless it can be sold to better advantage otherwise" than by shipping to the Chicago market. Yet it does not follow that in such case, the grain having gone to another market and sold, the plaintiffs would not be entitled to their share of the profits, if any there were, though they would not be entitled to constructive commissions on sales. But upon shipments to a rival firm, sold in the Chicago market, as is admitted by the defendant, the plaintiffs would be entitled to an equal share of commissions and profits.

It was also provided that the plaintiffs should make all necessary repairs of elevator above the sum of \$2. Though not expressly stated, the "repairs" provided for could only refer to the elevator, the means of operation, and one consideration of the contract. Early in the correspondence of the parties, preserved in the bill of exceptions, the plaintiffs, referring to "the cribs," in reply to defendant's communication of October 24, 1883, write "If any of them are badly wrecked they had better be taken down and the lumber sold. We do not know that you care to have so much crib room." And in their letters of December 3, 5, 6, and 7, following, they advise him to run partitions lengthwise through the cribs, dividing each into

three apartments, filling those outside first, and when the corn becomes dry fill the center. Construing these instructions with the tenor of the contract, it is apparent that the cribs, their changes, additions, and repairs, must be considered consubstantial with the elevator, and the cost and expenses chargeable against the plaintiffs.

It appears from the evidence that during the defendant's possession of the elevator the plaintiffs changed it from horse to steam power, built an engine house, and put in a stationary engine at their own expense, which the defendant testifies they had mainly paid, but claimed that a portion of it had been paid by him on their account, for which he still claimed to be reimbursed, and if valid would constitute a counter-claim against the plaintiffs.

In the pleadings and bill of exceptions an account between the parties is exhibited by the plaintiffs and two or more set up by the defendant. These accounts differ widely, and it is clear from the evidence that neither contains a full statement of all the transactions of the parties under the contract and within its purview.

The several matters in controversy may be summarized as follows:

I. The claim of defendant to charge up against the profits and commissions of the business the expense of receiving and handling the grain, including a salary to himself while employed in the business.

II. The plaintiffs' claim to charge up against the profits and commissions charges for storage and insurance of grain in store awaiting a favorable market.

III. The defendant's claim for damages for losses occasioned by plaintiffs' negligence in selling grain on defendant's order until the price had fallen in the market.

IV. The plaintiffs' claim of interest on defendant's overdrafts for money used as capital in the business.

V. The defendant's claim that the "demand notes and loan" by him to plaintiffs as collateral to the "crib re-

Warren v. Raben.

ceipts" of corn in the crib at Aurora, were made by him for the accommodation of the plaintiffs, and not chargeable with interest.

VI. The defendant's claim for payments for the permanent improvement of the elevator, building engine house and placing the engine, lumber, and material for corn cribs.

VII. The plaintiffs' claim to one-half of the profits and commissions on grain sold by defendant "otherwise" than in the Chicago market, and on all grain shipped to other parties in Chicago by defendant, added to the profits and commissions provided in the contract to be equally divided between the parties.

VIII. The state of accounts between the parties, and herein the discrepancies between the plaintiffs' and defendant's accounts exhibited, and those, if any, between the defendant's separate statements.

From the contract and the apparent intention of the parties, I reach the conclusion that the expense of receiving, handling, and shipping the grain, including the wages of workmen and laborers, is chargeable against the profits and commissions of the business; but that no salary or personal compensation to defendant for his time or services is due. These services were primarily employed in the enterprise, by the contract, without which it had neither beginning nor progress, and his compensation was to be found in the account of the net profits and commissions.

2. As to the plaintiffs' claim for money paid for storage and insurance of grain shipped to them, it cannot be determined by the terms of the contract, for it does not appear that the storage of grain in Chicago was contemplated by the parties to the contract. There is, however, some evidence in the letters and testimony of the parties as to quantities of grain shipped from time to time by defendant, and held in store by plaintiffs upon the order or by the assent of defendant, awaiting a rise in the market. If this appears by a preponderance of the evidence,

it will follow that such storage, and probably policies of insurance in such cases, would be chargeable against the profits and commissions.

The defendant alleges that under the contract, between August 1 and October 1, 1884, he shipped to plaintiffs more than 20,000 bushels of wheat, No. 2, which he directed to be sold on the first market at seventy-eight cents per bushel; that subsequently the price advanced to eighty-two and one-half cents, at which time the plaintiffs could have sold the whole at eighty-two cents per bushel, but did not, and negligently and carelessly withheld the wheat from sale until the market had fallen to seventy-four cents per bushel at which price the wheat was sold, by reason of which the plaintiffs received, and accounted to defendant, \$1,700 less than they should have obtained, and less than he is entitled to credit for.

It is doubtful, under the contract, that defendant had the absolute right to determine the time at which wheat should be held or sold without reference to the assent of the plaintiffs; but such doubt is probably put at rest by evidence that the plaintiffs, on one or more occasions during the progress of the grain business, held wheat in store awaiting the defendant's order to sell; so that probably the evidence is conclusive that the plaintiffs conceded the defendant's right to determine absolutely the time and condition of the market at which the wheat should be sold. Assuming this evidence, it would follow that if it appears that a quantity of wheat was in the hands of plaintiffs, ordered to be held for a market of seventy-eight cents, and then to be sold, and meanwhile the price advanced to seventy-eight cents, but through negligence or willful disregard of defendant's order it was withheld from sale until the market price had fallen to seventy-four cents, when the plaintiffs sold it, they will be held to account for it at seventy-eight cents per bushel.

The plaintiffs' claim for interest on the overdrafts of the

defendant is not within the contract. The defendant was to furnish the capital necessary to carry on and properly handle the grain business at Aurora, and shipping the grain to the plaintiffs. This was the consideration for the use of the grain elevator. Doubtless it employed the use of considerable sums of money to carry on the business at Aurora. Had the defendant had sufficient of his own, its use in the business would have been worth the current rate of interest on time loans, and hence the capital to be employed, in the equal business, was deemed a sufficient consideration for the use of the elevator. If the defendant was without sufficient capital of his own, which he admits in his correspondence, it was nevertheless his obligation to furnish it. And wherever he might supply it from, whether from loan offices at Aurora or Chicago, whether by the plaintiffs' indorsement as surety or otherwise, he would have to pay the current rate of interest therefor. And so, also, if the defendant, at any time during the course of the business, for the want of money on hand to pay for grain as it was offered, made drafts on the plaintiffs in excess of cash to his credit in their hands, and such drafts were paid by plaintiffs, creating an overdraft account against defendant, the plaintiffs would be entitled to the amounts with legal interest. Where the amount of overdrafts, or debtor balance, fluctuates and varies from day to day, it is customary to cast interest daily at the close of business, weekly at the close of the week, or monthly at the close of each month. There is evidence tending to support the above propositions, but not having opportunity to determine its sufficiency, the facts are not now passed upon.

Fifth—The defendant claims that the demand notes executed to the plaintiffs, and secured by bills of sale on cribs of corn at Aurora, were such accommodation notes, for the benefit of the plaintiffs, that no interest thereon, or for money obtained thereon, was chargeable against him, or to the grain business. It will be seen from the evidence that

two of such bills of sale, accompanying corresponding notes of defendant, forwarded to plaintiffs and credited in their account with defendant as so much money, were introduced in evidence as exhibits of a considerable number of the same kind. These bills and notes contain a promise by defendant that N. H. Warren & Co. should, the corn implied being shipped to them, sell the same, and retain from the proceeds the freight, insurance, and customary charges for hauling, their advances of money and interest thereon at eight per cent, and one per cent per bushel commissions, the remainder to be paid to defendant. These obligations were acknowledged by defendant and recorded in Hamilton county. They were to be used to secure the plaintiffs, and such banks or other parties as might advance money on them, to enable defendant to extend his purchase of corn. This purchase was an element of the grain business which he agreed to carry on at Aurora in connection with the plaintiffs and for which he agreed to furnish the necessary capital. The papers termed "crib receipts," to secure the demand notes to the plaintiffs, was the defendants method of supplying capital to carry on the business, and was for his own accommodation, rather than that of the plaintiffs, who were under no contract to furnish capital.

As we have seen, the contract provides that repairs amounting to more than \$2 shall be paid by the plaintiffs, and that this provision will be held to include all repairs and additions to corn cribs, so that if the evidence shall show that the defendant supplied money, material, or labor for repairing corn cribs, building additional ones upon the ground occupied by the plaintiffs' cribs and elevator, or in the permanent improvement of the elevator plant, he will be entitled to the sum as a credit in the statement of accounts between the parties.

Seventh—If the evidence shows a profit upon grain bought by defendant, not shipped to plaintiffs, such profit should be added to that of the general business, and divided equally between the parties.

As a correct and just decision of the cause involves the critical examination of a voluminous record, embracing in great part the correspondence of the parties, their accounts, and the defendant's testimony, consisting of 273 pages, the judgment of the district court is reversed *pro forma* and the cause referred to J. A. Marshall, Esq., sole referee, to state an account between the parties from the pleadings and evidence, upon the construction of the contract and law, as stated in this opinion, and report the same to this court on or before December 15, 1891. And said referee is especially directed to find and report:

1. The amount actually paid and expended by the defendant in the purchase of grain actually shipped to the plaintiffs.

2. The amount paid and expended by the defendant as expenses at Aurora in receiving, handling, elevating, and shipping grain consigned to the plaintiffs, including the wages of men necessarily employed in shelling corn, cleaning wheat, or other grain, and in operating the elevator.

3. The amount paid by plaintiffs for storage and insurance on grain shipped by defendant, designating the amounts paid on account of each.

4. Whether at any time during the continuance of the contract, and while there was a quantity of wheat No. 2 in the hands of the plaintiffs, shipped by defendant, he gave to them an absolute or unqualified order to sell such wheat wherever they could at seventy-eight cents per bushel; or whether the price of that grade of wheat in Chicago, after the giving of such order, arose to seventy-eight cents per bushel, and the plaintiffs, through negligence, failed to comply with the order and failed to sell the wheat until the price had declined to seventy-four cents per bushel; and if so, how much wheat had the defendant in the hands of the plaintiffs at the date of such order, and how much money was lost to defendant by reason of such negligence by the plaintiffs?

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5. Whether during the progress of business under the contract the defendant drew drafts upon the plaintiffs, which were accepted and paid, in excess of money in their hands due to him as proceeds of grain sold for him, under a promise, express or implied, to pay interest on such overdraft; and, if so, at what rate of interest, and what is the gross amount due the plaintiffs on account of such interest?

6. The amount actually paid by defendant for material or labor expended in repairing the elevator named in the pleadings in excess of \$2 in any instance, or for corn cribs, or for building new cribs upon premises adjacent to the plaintiffs' elevator and cribs, or in the alteration and change of the elevator from horse to steam power, or other permanent improvement thereof.

7. The amount, if any, of the profit on grain bought by defendant and not shipped to the plaintiffs, including that shipped to other parties in Chicago.

8. The amount of commissions at the rate of the Chicago board of trade upon all grain bought by defendant and shipped to parties in Chicago other than the plaintiffs.

9. The gross amount of profits, if any, on all grain bought by defendant and shipped to plaintiffs.

10. The gross amount of commissions at the rate mentioned upon all grain shipped by defendant to the plaintiffs and sold by them.

Upon the coming in of the report of the referee, and its approval, judgment will be rendered in this court.

JUDGMENT ACCORDINGLY.

THE other judges concur.

HUGH MURPHY V. CITY OF OMAHA.

[FILED NOVEMBER 11, 1891.]

Interest: DELINQUENT PAYMENTS ON CONTRACT. One M. constructed a sewer for the city of O., the contract price being the sum of \$28,045.40. Payments were made from time to time so that when the work was accepted on October 3, 1888, there remained due the contractor the sum of \$7,551.50 and five per cent of the total contract price, viz., \$1,402.27, to be held six months. The principal without interest was afterward paid. *Held*, That in the absence of a contract to the contrary the contract price, less the five per cent, was due upon the acceptance of the work and that the contractor was entitled to seven per cent interest upon the amount due until it was paid. Likewise, that he was entitled to interest on the five per cent fund held in reserve after the expiration of six months from October 3, 1888, until it was paid.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Switzler & McIntosh, for plaintiff in error:

The plaintiff is entitled to interest, under the statute. (*Whitwell v. Willard*, 1 Met. [Mass.], 216; Sweet's Law Dic., title "Account"; Anderson's Law Dic., title "Account," and cases; *Rensselaer v. Reid*, 5 Cowan [N. Y.], 587; *Beck v. Devereaux*, 9 Neb., 109.) Aversion to the taking of interest has prevailed generally among nations in a low stage of civilization. (Ency. Brit., title "Interest"; Walker's Political Economy, 231.) Interest is here recoverable as an incident of the debt, regardless of the statute. (*Brown v. Com'rs*, 1 Green [Ia.], 486; *Heiman v. Schroeder*, 74 Ill., 158.) Independent of statute, plaintiff would be entitled to recover damages for the failure of defendant to perform its contract, and the measure of damages would be the legal rate of interest on the sum withheld from the date of the breach. (Sedgwick, Damages, p.

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493; *Bell v. Arndt*, 24 Neb., 261; *F., E. & M. V. R. Co. v. Marley*, 25 Id., 138; *Fisher v. Bidwell*, 27 Conn., 370; *Mason v. Callender*, 2 Minn., 302; *Dodge v. Perkins*, 9 Pick. [Mass.], 384; *Foot v. Blanchard*, 6 Allen [Mass.], 222; *Van Rensselaer v. Jewett*, 2 N. Y., 135; *Lush v. Druse*, 4 Wend. [N. Y.], 313; *Van Rensselaer v. Jones*, 2 Barb. [N. Y.], 643; *Adams v. Bank*, 36 N. Y. Ct. App., 260; *Purdy v. Phillips*, 11 N. Y., 406; *Dana v. Fiedler*, 12 Id., 40; *People v. N. Y.*, 5 Cow. [N. Y.], 331; *Sturges v. Green*, 27 Kan., 235; *Risley v. Andrew Co.*, 46 Mo., 382.) A municipal corporation, in all matters of contract, where it has authority to act, is subject to the same requirements as an individual. (*Cincinnati v. Cameron*, 33 O. St., 336; 1 Dill., Mun. Corp., sec. 39; *Argenti v. San Francisco*, 16 Cal., 256; *Touchard v. Touchard*, 5 Cal., 306; *Thorndike v. U. S.*, 2 Mason [U. S.], 1; *Smoot's Case*, 15 Wall. [U. S.], 36; *Amoskeag Mfg. Co. v. U. S.*, 17 Id., 592; *U. S. v. Mueller*, 113 U. S., 156; *Clark v. U. S.*, 6 Wall. [U. S.], 543.)

A. J. Poppleton, contra:

There is no express stipulation to pay interest from the completion of the work, and no charter provision authorizing it. The better rule is against the position contended for by plaintiff in error. (*City of Pekin v. Reynolds*, 31 Ill., 529; *People v. Tazewell Co.*, 22 Id., 147; *Johnson v. Stark Co.*, 24 Id., 75; *Madison Co. v. Bartlett*, 1 Scam. [Ill.], 67; *Allison v. County*, 50 Pa. St., 351; *Gafney v. San Francisco*, 13 Pac. Rep. [Cal.], 468; *County of Clay v. Chickasaw*, 1 S. Rep. [Miss.], 753.)

MAXWELL, J.

This action was brought by the plaintiff against the defendant to recover the sum of \$8,953.77, balance due him for the construction of a sewer. The petition and answer are very long and need not be noticed. The following is a stipulation of facts:

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"First—That the defendant is a municipal corporation, organized and existing under the laws of the state of Nebraska as a city of the metropolitan class.

"Second—That on the 3d day of April, 1888, the city council of the defendant passed ordinance No. 1662, entitled 'An ordinance creating sewer district number 67 in the city of Omaha, and ordering the construction of the sewer in said district.' That section 1 of said ordinance created said district, section 2 described the boundaries thereof, and section 3 provided as follows: 'The board of public works is hereby required and directed to take the necessary steps to cause the construction of the sewer in said district.' That section 4 provided as follows: 'This ordinance shall take effect and be in force from and after its passage.' That said ordinance was approved by the mayor on the 4th day of April, 1888.

"Third—That in pursuance of said ordinance and in obedience thereto the said board of public works caused the following notice of sewer proposals to be duly published in the *Omaha Republican*, then the official paper of said city, on the 12th, 13th, 19th, and 20th days of April, 1888, to-wit:

"SEWER PROPOSALS.

"Sealed proposals will be received by the undersigned until 1:30 o'clock P. M. April 27, 1888, for the construction of sewers in sewer districts 66, 68, 67, and reconstruction of sewer in sewer district No. 3, as per ordinances numbers 1656, 1657, 1662, and 1655, and in accordance with plans and specifications on file in the office of the board of public works. Proposals to be made on printed blanks, to be furnished by the board of public works, and to be accompanied by a certified check of \$500, payable to the city of Omaha, as evidence of good faith. The board reserves the right to reject any and all bids and to waive defects.

ST. A. D. BALCOMBE,

"Chairman of Board of Public Works, Omaha, Neb.

"April 11, 1888.'

"That upon the opening of the said bids received in pursuance of said advertisement, the plaintiff was duly found and determined to be the lowest responsible bidder for the construction of said sewer in said district number 67, and said contract was duly awarded to him.

"Fourth—That on the 5th day of May, 1888, the plaintiff entered into a contract with the defendant, a true copy of which is hereto attached, marked 'Exhibit A' and made a part hereof, and that on said date there was \$130,083.63 in the general fund of said city.

"Fifth—That the plaintiff performed and observed all the things by him in said contract agreed to be done, performed, or observed, and that said work done and material furnished by said plaintiff under said contract were approved by the city engineer, board of public works, mayor, and city council of said defendant, prior to the 3d day of October, 1888.

"Sixth—That all the work embraced in said contract was fully completed agreeably to the specifications and stipulations thereof and was accepted by the city engineer and board of public works on the 3d day of October, 1888, and that on the said 3d day of October, 1888, the said city engineer made a final estimate of the amount and value of said work according to the terms and price of said contract; that in said final estimate so made the said city engineer found the total value of the work done by said plaintiff under said contract to be the sum of \$28,045.40; that the said city engineer there and then found that five per cent of said total amount was the sum of \$1,402.27; that by deducting said five per cent the said city engineer there and then found the amount then due to said plaintiff to be the sum of \$26,643.13; that the period of six months, at the expiration of which the said five per cent reserve was payable to the plaintiff, expired on the 3d day of April, 1889, and that no part of said five per cent reserve was required or used by the defendant for paying the cost of

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repairs for which the same was reserved, but on the said 3d day of April became due and payable to the plaintiff; that the said plaintiff, so far as is known to said defendant, duly paid the laborers employed on said work under said contract, duly paid for the materials used therein, and that the city council did not withhold any part of the value of said work done under said contract for the purpose of satisfying said city that all of such claims for labor and material were paid; that a true copy of said final estimate of the city engineer is hereto attached marked 'Exhibit B,' and made a part hereof; that said final estimate was duly approved by the board of public works and city council of said city on the 3d day of October, 1889, and was placed on file in the office of the city comptroller of said city on the 4th day of October, 1888.

"Seventh—It is agreed that for the work done and material furnished by said plaintiff for said defendant under said contract, said defendant paid to such plaintiff prior to the bringing of this suit, to-wit, the 6th day of November, 1888, the sum of \$19,091.63, and no more; that the balance due and unpaid to said plaintiff from said defendant on said contract at the time of the bringing of this suit was the sum of \$7,551.50, and that the five per cent reserve held by the defendant under the terms of said contract, to-wit, the sum of \$1,402.27, became due and payable to said plaintiff on the 3d day of April, 1889.

"Eighth—It is further agreed, in addition to the payment by said defendant to said plaintiff above set forth, said defendant paid to said plaintiff on the 19th day of April, 1889, and subsequent to the bringing of this suit, and upon said contract, the sum of \$7,551.50, and that in like manner the said defendant paid to the plaintiff on the 7th day of May, 1889, the sum of \$1,402.27, and that there is still due to the plaintiff on account of said contract and unpaid such a sum as interest or damages as the court upon the foregoing statement of facts shall find him entitled to.

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"Four addenda. Such payments as were made on said contract were made out of a fund created by a special levy known as levy No. 1231, of one dollar per front foot on property benefited by construction of said sewer, except that when said last named fund was exhausted, the balance of said payments were made out of the South Omaha sewer fund; that said special levy No. 1231 raised \$18,895.50, and the balance of costs of said sewer in sewer district No. 67, to-wit, \$9,551.50, was paid out of the South Omaha sewer fund, both of said funds being applicable to said purpose. On the 5th day of May, 1888, there was \$657 in the South Omaha sewer fund.

"Ninth—It is agreed between the parties hereto that if, at any time before the close of the trial, any material fact is found to have been omitted or misstated in this stipulation, such error or omission may be corrected upon production of the proper record evidencing said error or omission, and that oral testimony may be taken upon the question of demand for payment of money due on said contract."

The court below found the issues in favor of the defendant and dismissed the action.

From the stipulation of facts it appears that the work was accepted October 3, 1888, and that on the 19th of April, 1889, \$7,551.50 was paid. In May, 1889, the five per cent of the contract price held back by the city for six months also became due and was paid. The only question presented is the liability of the city to pay interest upon demands arising upon contract which are due.

Sec. 2, chap. 44, Comp. Stats., provides: "Interest upon the loan or forbearance of money, goods, or things in action shall be at the rate of seven dollars per year upon one hundred dollars, unless a greater rate, not exceeding ten per cent per annum, be contracted for by the parties."

Sec. 3 provides: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of seven dollars upon each

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one hundred dollars annually until the same shall be paid; *Provided*, That if said judgment or decree shall be founded upon any contract, either verbal or written, by the terms of which a greater rate of interest, not exceeding the amount allowed by law, than seven per centum shall have been agreed upon, the rate of interest upon such judgment or decree shall be the same as provided for by the terms of the contract upon which the same was founded."

Sec. 4 provides: "On money due on any instrument in writing, or on settlement of the account from the day the balance shall be agreed upon, on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by unreasonable delay of payment, interest shall be allowed at the rate of seven per cent per annum. Unsettled accounts between parties shall bear interest after six months from the date of the last item thereof."

This law is general in its terms, and applies to cities as well as natural persons. Justice is best promoted by the adoption of a uniform rule applicable to all, whether high or low, rich or poor. It is the duty of a city to provide for raising the necessary means to defray the expenses of constructing improvements. Unless it is stipulated to the contrary, the work is ordinarily to be paid for and accepted. If the work is not to be paid for at that time, it is the result of a contract to extend the time. In the absence of any contract that payment shall be delayed, the city will be liable for interest like any other debtor. Any other rule is fraught with injustice, and if once established would exclude men of scanty means from taking such contracts, as the delay in payment and loss of the use of the money might, and in many cases would, cause a serious loss which, to one not possessed of ample means, could result in bankruptcy. In its business transactions a city should be required to conform to the ordinary rules, and all exemptions

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claimed which would work injustice should be denied. One rule for all is the most satisfactory and reasonable. It is evident that the plaintiff is entitled to interest on the sums named while the money was withheld by the city, and the judgment of the court below is reversed and judgment will be entered in this court for such interest, the amount thereof to be computed by the clerk.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ANGLO-AMERICAN LAND, MORTGAGE & AGENCY CO.,
LTD., APPELLANT, V. MARY BROHMAN ET AL., AP-
PELLEES.

[FILED NOVEMBER 11, 1891.]

Usury: HOW PLEADED. An answer setting up the defense of usury must state the particular facts of the alleged agreement in order that the court may see that it was in violation of the statutes of the state. It is not sufficient to allege that the "bond * * was given in payment of usurious interest by a contract for the payment of the same."

APPEAL from the district court for Merrick county.
Heard below before POST, J.

D. H. Ettien for appellant, cited, on the question of usury: *New Eng. Mtg. Sec. Co. v. Sanford*, 16 Neb., 691; *Nichols v. Fearson*, 7 Pet. [U. S.], 103; *Richards v. Kountze*, 4 Neb., 205; *Hager v. Blake*, 16 Id., 13; *Kirkpatrick v. Henson*, 1 S. Rep. [Ala.], 192; *Munter v. Linn*, 61 Ala., 492; *English v. Smock*, 34 Ind., 132; *Mowry v. Bishop*, 5 Paige [N. Y.], 102; *Monnett v. Sturges*, 25 O. St., 384; *Meyer v. Muscatine*, 1 Wall. [U. S.], 391; *Mitchell v.*

33	409
86	188
33	409
50	788
83	409
56	454

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Mortgage Co., 110 Ill., 235; *Mitchell v. Lyman*, 77 Id., 525; *Fleckner v. Bank*, 8 Wheat. [U. S.], 339; *Mathews v. Toogood*, 23 Neb., 536; *Tepoel v. Saunders Co.*, 24 Id., 815.

J. C. Martin, contra.

MAXWELL, J.

This is an action to foreclose a mortgage on real estate. On the trial of the cause the court found the issues in favor of the defendant and dismissed the action. The court made special findings as follows:

"On the 31st day of October, 1885, the defendant Mary Brohman borrowed from the Lombard Investment Company the sum of \$1,300, for which she executed her promissory note, due seven years after date, at six per cent interest per annum, payable semi-annually, the interest being represented by coupons attached to said note, due at intervals of six months, the first maturing May 1, 1886, and all providing for interest at ten per cent per annum after due.

"II. To secure the \$1,300 note above described, defendant Mary Brohman and her husband, on the 31st day of October, 1885, executed to the Lombard Investment Company their mortgage upon the premises described in the petition, and in said mortgage it is provided, among other things, that the borrower has the option of paying \$100, or any number of hundreds of dollars, of the principal sum at the maturity of any interest coupon on or after November 1, 1888.

"III. On the said 31st day of October, 1885, and as a part of the same transaction, and as a further consideration for the use of said sum of \$1,300, the said defendant executed to said Lombard Investment Company the note, or bond and mortgage, involved in this action, for \$364, due in two years after date, or on the 1st day of November,

1887, and bearing interest at ten per cent per annum after maturity.

"IV. By the agreement aforesaid between defendants and the said Lombard Investment Company the aforesaid sum of \$364 represents interest on the principal sum of \$1,300, loaned to defendant on said October 31, 1885, at four per cent per annum, for the full period of seven years, and that there was no consideration therefor.

"V. The note or bond last above described was indorsed in blank by the Lombard Investment Company, and by it transferred and delivered to this plaintiff before the commencement of this action, and plaintiff is now the owner and holder thereof.

"VI. Said bond, or note and mortgage, were not purchased by plaintiff in the usual course of business, before due, for value.

"And the court further states the following conclusions of law:

"I. The plaintiff, the Anglo-American Land, Mortgage & Agency Company, Limited, is not a *bona fide* owner or holder of the note, or bond and mortgage, in question.

"II. That the said note, or bond and mortgage, are usurious.

"III. That the equities herein are with the defendant.

"IV. That the only relief sought in this action is the recovery of interest on a usurious contract, and that the petition should be dismissed.

"It is therefore by the court here ordered and decreed, that the plaintiff's petition herein be dismissed, and that the defendants have and recover of and from the plaintiff the costs herein expended, taxed at \$——."

The question presented is the sufficiency of the answer to sustain the defense of usury. The answer is as follows:

"Now comes the defendants Mary Brohman and W. D. Brohman, and in answer to the plaintiff's petition admits:

"I. That these defendants did legally execute and de-

liver to the Lombard Investment Company, a corporation, the bond and mortgage as set forth in plaintiff's petition at the time therein set forth, and that said bond was duly recorded as set forth in said petition.

"II. These defendants further answering, allege that at the time of the execution and delivery of the mortgage and bond set forth in said petition, and as a part of the same entire transaction, these defendants executed and delivered to said Lombard Investment Company another mortgage to secure the payment of a certain bond and coupons thereto attached, at the same time executed and delivered to said Lombard Investment Company. Plaintiff alleges that the bond on which this action is brought was given for payment of certain interest upon the principal sum of the other bond herein set forth.

"III. These defendants further allege that the bond upon which this action is brought was given in payment of usurious interest by a contract for the payment of the same by and between the said Lombard Investment Company and these defendants.

"IV. Defendants further answering, deny each and every other allegation in said plaintiff's petition contained.

"V. That the plaintiff herein is not a *bona fide* purchaser for value before maturity of the bond and mortgage upon which this action is brought.

"These defendants therefore pray that there may be found to be nothing due the plaintiff herein from these defendants on this cause of action, and that the plaintiff's mortgage may be stricken from the records as a lien against the property in controversy in this action, and that plaintiff be adjudged to pay the costs of this suit."

It is a familiar rule that an answer setting up the defense of usury must state the facts of the alleged agreement, to the end that the court may see that the agreement was in violation of the statute. It is not sufficient to allege that the "bond * * * was given in payment of usu-

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rious interest by a contract for the payment of the same," etc.

It is very clear that the answer in this case falls far short of stating an usurious contract, and therefore it is insufficient.

There is considerable testimony in the record upon the question of the consideration for the notes in question.

We will, therefore, *pro forma*, reverse the judgment and remand the case to the district court, with directions to permit an amended answer to be filed containing a sufficient plea of usury and such other defenses as the party may have, and for further proceedings.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LORINDA SEEBROCK ET AL., APPELLANTS, V. MARGARET
A. FEDAWA, APPELLEE.

[FILED NOVEMBER 11, 1891.]

1. **Wills: DESCRIPTION: MISTAKE.** An error in the description in a will, either of the legatee or of the subject-matter of the devise, will not avoid the will if sufficient remain to show with reasonable certainty what was intended.
2. ———: ———: ———. Where a testator devised lots 4 and 9 and the west one-half of 10 in block 32, in the city of Lincoln, and he was not the owner of lot 4, but did own lots 3, 9, and the west one-half of 10, and those were all the lots possessed by him in that block, *held*, that lot 3 passed by the will.
3. ———: **BONA FIDE CONTESTANTS: COSTS TAXED TO ESTATE.** Where an estate of considerable value was devised to the wife of the testator and her children, and the children of the testator by a former marriage were practically disinherited, and sufficient grounds existed to justify them in contesting the will, the costs and a reasonable attorney's fee to the attorneys for the contestant will be taxed to the estate.

33	413
44	191
23	413
50	303
39	413
006	59
38	413
61	887

REHEARING of case reported 30 Neb., 424.

Lamb, Ricketts & Wilson, for appellants.

Pound & Burr, Billingsley & Woodward, and *N. C. Abbott*, contra.

MAXWELL, J.

This case was before this court in 1889, the judgment of the court below being affirmed. A motion is now made by the contestants to modify the judgment so as to leave out lot 3 in block 32, in the city of Lincoln, as said lot is not devised in the will. There is also an application for fees and costs. The will in question is as follows:

“LAST WILL AND TESTAMENT OF JOHN ADAM
FEDAWA.

“I, John Adam Fedawa, of the city of Lincoln, Nebraska, being of sound disposing mind and memory, do make, publish, and declare this my last will and testament.

“I give, bequeath, and devise unto my beloved wife, Margaret Ann Fedawa, all and every of my personal estate and property of every description and nature whatsoever, and wheresoever the same may be situated, except as hereinafter named. I also give, bequeath, and devise unto my wife, Margaret Ann Fedawa, all of lots numbered 4 and 9, the west one-half of lot numbered 10, all in block numbered 32, in the city of Lincoln, Lancaster county, and state of Nebraska, according to the recorded plat thereof.

“To have and to hold all of the said above described property to her exclusive use and benefit, so long as she shall remain my widow, or until my beloved son, Jay Gould Fedawa, shall come to the age of twenty-one years, then and upon either of these conditions the said above described property shall be divided equally, share and share alike, among my four beloved children, Millie May Fedawa, Flora Belle Fedawa, Florence Dale Fedawa, and Jay Gould Fedawa.

Seebrook v. Fedawa.

"Provided further, that should it be found necessary to sell and dispose of any of said property, that lot numbered 4 of block numbered 32 of above described property may be sold, and none other.

"I further give, bequeath, and devise unto my children by my first wife, J. A. M. Fedawa, Lorinda Fedawa, and Milton Fedawa, the sum of seventy-five dollars, cash money, to be paid to them upon my death, share and share alike.

"All the rest and residue and remainder of my estate, both real and personal, I hereby give, bequeath, and devise unto my said wife, Margaret Ann Fedawa, and as well the lots hereinbefore described, to-wit, lots numbered 4 and 9 in the west half of block numbered 32, in Lincoln, Nebraska, hers to have and to hold, to own and control, subject, however, to the conditions herein mentioned.

"And provided further, that my said wife shall not, by taking under this will, waive or relinquish her right of dower in said premises, upon the determination of her life estate herein created.

"I hereby appoint my said wife, Margaret Ann Fedawa, and Carlos C. Burr, joint executors of this my last will and testament, hereby revoking all former wills by me made, and I hereby authorize and empower my said executors, on the sale of said lot 4, to make, execute and deliver any and all deeds necessary of conveyance, necessary and proper to pass title thereto to any purchaser, and that such deed as they may make shall be construed to pass the interest therein which by its terms such deed purports to convey, and they shall not be required in the premises to ask any aid from any court.

"In witness whereof, I have hereunto set my hand and seal this 29th day of December, 1886.

"JOHN ADAM FEDAWA.

"Signed in the presence of

"A. F. PARSONS.

"F. C. HARRISON."

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It is admitted that Fedawa did not own lot 4 in block 32, but he did own lot 3 in that block, and the contestees contend that parol evidence is admissible in connection with the statements in the will to show that he intended to devise lot 3. The language of the will is: "I also give, bequeath, and devise unto my wife, Margaret Ann Fedawa, all of lots 4 and 9, the west half of lot numbered 10, all in block 32." The evidence clearly shows that these were all the lots he possessed in block 32.

While it is true that oral evidence cannot be admitted to change the language of a written instrument, and particularly of a will, yet the universal rule at the present time is to admit oral proof to show that one term was used for another, or that an essential term, to make the definition perfect, was omitted or erroneously stated. For the purpose of arriving at the intention of the testator, therefore, the will is to be read in the light of the surrounding circumstances. Thus, suppose a party should devise the manor of B., and it should appear that the testator possessed two manors—one known as East B., and the other as West B.—parol evidence is admissible to explain the ambiguity by showing the testator's intention. (*Oxenden v. Chichester*, 4 Dow. [Eng.], 65; 3 Taunt. [Eng.], 147; *Doe d. Thomas v. Beynon*, 4 P. & D. [Eng.], 193; 12 A. & E. [Eng.], 431; *Fleming v. Fleming*, 1 H. & C. [Eng.], 242; 8 Jur. [N. S.], 1,042; 31 L. J. Exch., 419; 10 W. R., 778; 6 L. T. [N. S.], 896; *Doe d. Morgan v. Morgan*, 3 Tyr. [Eng.], 179; 1 C. & M., 235; *Whitaker v. Tatham*, 7 Bing. [Eng.], 628; 5 M. & P. [Eng.], 628; *Allen v. Allen*, 4 P. & D. [Eng.], 220; 12 A. & E. [Eng.], 451; 4 Jur., 985.)

The rule in construing wills is, that although there may be errors in the description, either in the legatee or the subject-matter of the devise, it will not avoid the bequest if enough remain to show with reasonable certainty what was intended (*Rom. Cath. O. Asylum v. Emmons*, 3 Bradf.

Seebrook v. Fedawa.

[N. Y.], 144; *Jackson v. Sill*, 11 Johns. [N. Y.], 201; *Kurtz v. Hibner*, 10 Am. Law Reg., 99), and parol evidence is admissible to correct the mistake. (*Patch v. White*, 117 U. S., 210; *Decker v. Decker*, 121 Ill., 341; *Moreland v. Brady*, 8 Ore., 303; *Gilmer v. Stone*, 120 U. S., 586.)

It is evident that the testator intended to devise all the lots he possessed in block 32 in the city of Lincoln, and that lot 3 was intended in place of lot 4.

We are asked to tax the costs of the contest to the estate, and also to allow a reasonable attorney's fee to the attorneys for the contestants. The contestants in this case were the children of the first wife of the testator. The estate is shown to be quite valuable, and they were practically disinherited. There is a large amount of testimony in the record tending to show that for some time prior to making the will the testator was not in a condition of mind to make a proper disposition of his property. There is other testimony tending to show that he was of sound and disposing mind at the time of making the will. This testimony was submitted to a jury and the will sustained. Thus the questions of fact were found by the jury, and the evidence being conflicting, this court could not say that it was clearly wrong, although, had the question been primarily submitted to this court, it is probable that a different conclusion would have been reached. There was probable cause, therefore, for contesting the will, and the costs will be taxed to the estate, and the attorneys for the contestants allowed the sum of \$1,000 for all fees and expenditures, to be paid within ninety days.

JUDGMENT ACCORDINGLY.

THE other judges concur.

W. S. ASKWITH V. ALLEN BROS.

[FILED NOVEMBER 11, 1891.]

Attachment: GROUNDS. *Held*, That the fourth and fifth grounds for attachments are sustained by a preponderance of the evidence.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Brome, Andrews & Sheean, for plaintiff in error.

E. M. Bartlett, and *Thomas D. Crane*, *contra*, cited: *Livermore v. Rhodes*, 27 How. Pr. [N. Y.], 506; *Young v. Cooper*, 12 Neb., 616; *Drake*, Attachment, sec. 75, and cases; *Rosenfield v. Howard*, 15 Barb. [N. Y.], 546; *Reed v. Noxon*, 48 Ill., 323; *Rosenthal v. Wehe*, 58 Wis., 621; 1 Wade, Attachment, sec. 98, and cases; *Stone v. Covell*, 29 Mich., 359.

NORVAL, J.

The defendants in error brought suit in the county court of Douglas county against the plaintiff in error to recover the sum of \$453.81 upon a balance of account for goods sold and delivered. An affidavit for an attachment being filed, an order of attachment was issued, and Askwith's stock of goods was attached. The affidavit stated the following grounds for attachment:

"1. That defendant is about to remove his property, or a part thereof, out of the jurisdiction of this court, with intent to defraud his creditors.

"2. Is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors.

"3. Has property or rights in action which he conceals.

"4. Has assigned, removed, and disposed of his property, or a part thereof, with intent to defraud his creditors, and is about to remove, assign, and dispose of the remainder with a like intent.

"5. Fraudulently contracted the debt on which this suit has been brought."

The defendant moved to dissolve the attachment for the following reasons :

"1. Because the facts stated in the affidavit for the attachment are not sufficient to justify the issuing of the same.

"2. Because the statements of facts in said affidavit are untrue."

The motion was heard upon numerous affidavits and depositions, and, from an order of the county court discharging the attachment, the plaintiffs prosecuted error to the district court. The decision of the county court was reversed, and the attachment sustained. The cause is before us on error.

No question is now made as to the sufficiency of the attachment affidavits, but it is urged that the plaintiffs had no legal cause for suing out the writ.

In 1888, Askwith was a retail dealer in groceries and general merchandise in the city of Omaha, and the defendants in error were wholesale grocers, doing business in Omaha, under the firm name of Allen Brothers. On the 2d day of September, 1888, Askwith was indebted to the defendants in error, on account of goods previously sold and delivered, about the sum of \$250. Subsequently, but prior to the commencement of this suit in November, he purchased from Allen Brothers, on credit, goods amounting to over \$700. During the same time he paid on his account something over \$500, leaving a balance due the defendants in error, at the commencement of this action, of \$453.81.

Evidence was adduced to show that in the fore part of

Askwith v. Allen.

September, 1888, Askwith, for the purpose of obtaining further credit, represented to Edgar H. Allen, one of the defendants in error, that he owed no one except Allen Brothers, that he owned a valuable farm in Madison county, had a stock of goods worth \$1,700 to \$2,000, and good book accounts worth \$1,200; that the defendants in error relied upon these representations in selling the goods that were purchased by Askwith after that time. At the time the statements were made, the plaintiff in error was indebted to several other dealers, and owned no land in Madison county, having deeded it months before to his brother-in-law, Isaac Piles.

It also appears that on November 22, when Askwith purchased of Allen Brothers the last bill of goods, amounting to \$42.80, he gave in payment therefor his check on the Bank of Commerce, and on being asked by Edgar H. Allen if he had money in the bank to meet it, Askwith replied that he had. The check was subsequently presented to the Bank of Commerce, but payment was refused for the reason that Askwith did not have the necessary funds to meet the same. The bill of goods having never been paid for, the amount thereof is included in the account sued on.

There is also in the record testimony to the effect that Askwith stated to H. C. Atwell, after this suit was brought, that at the time the attachment was sued out he was making arrangements to give a bill of sale of his property to his mother, and would have done so but for the attachment, although he was not indebted to her; that Askwith, on being asked why he contemplated giving his mother a bill of sale, replied that it was because he had heard that Allen Brothers were intending to attach him, and he had to take some steps to protect himself, and prevent one creditor from getting more than his share; that by giving a bill of sale or mortgage he would be in a better position to treat with his creditors; that he once settled with his cred-

Askwith v. Allen.

itors at sixty cents on the dollar and had intended to make such a settlement with Allen Brothers, or let them go without anything; that now he felt as though they deserved to get nothing, and he proposed that they should not get anything; that he had been through the mill before and made his creditors come to his terms, and he proposed to do the same with Allen Brothers.

Askwith, in his affidavits filed in support of his motion to dissolve the attachment, denies any charge of fraud made in the original affidavit of attachment, as well as each and every statement contained in the affidavits used to sustain the attachment. We have examined with great care all the testimony used on the hearing of the motion to discharge, and are satisfied that the fourth and fifth grounds for attachment are sustained by a fair preponderance of the evidence. The proof is convincing that the plaintiff in error not only fraudulently contracted the debt sued on, but was about to make a bill of sale of his property to his mother with the intent to defraud his creditors, and would have done so had the attachment been delayed. The defendants in error were, therefore, justified in suing out a writ.

The case is clearly distinguishable from *Mayer v. Zingre*, 18 Neb., 458, cited in brief of counsel for plaintiff in error. There the petition contained two causes of action, one for a debt fraudulently contracted and the other was not so contracted. An order of attachment, covering both causes of action, was issued upon an affidavit alleging that the defendant fraudulently contracted the debt sued on. It was ruled that the attachment must be discharged for want of grounds covering the whole debt.

In the case at bar no such question is presented. Here there are at least two grounds of attachment covering the entire debt. If the only cause for suing out the writ was the false representations made at the time the last bill of goods was purchased, as to his having the money in the bank to pay the check, then the precedent cited would

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control our decision. But the preponderance of the evidence shows that the whole indebtedness for which suit was brought was incurred on the strength of the misrepresentations made by Askwith as to his financial standing. True, he owed Allen Brothers at the time the representations were made something over \$200, but this was liquidated by the payments subsequently made. Counsel for plaintiff claim that the money paid after the date of this representation should be applied in payment of the goods bought after that time. There is no claim that Askwith gave any direction that the money should be so applied. It appears in evidence that the goods were bought on thirty days' time, and the statement of the account shows that \$183.10 was paid during the month of September, 1888, before any bill of goods fell due which was purchased after Askwith made a statement of his financial condition to the defendants in error. There is nothing in the record that would justify us in holding that he was meeting his bills before maturity. The plaintiff in error having given no directions as to how his payments should be applied, they should go to discharge the bill longest past due. The judgment of the district court is

AFFIRMED.

THE other judges concur.

33	422
42	840

FRANK FULLER V. COUNTY OF MADISON.

[FILED NOVEMBER 11, 1891.]

1. **County Attorney: ASSISTANT.** Under the proviso clause of section 20, chapter 7, Compiled Statutes, a county attorney, when the public interests demand, may, under the direction of the district court, procure at the expense of the county an attorney to assist him in the trial of a person charged with a felony.

2. ———: ———: COMPENSATION: CHANGE OF VENUE. When such services are rendered in the trial of a person upon a change of venue, compensation therefor is to be made by the county in which the offense was committed.

ERROR to the district court for Madison county. Tried below before POWERS, J.

Frank Fuller, pro se.

Burt Mapes, contra.

NORVAL, J.

An information was filed in the district court of Madison county against one A. E. Kelley, charging him with the crime of murder. On application of the accused for a change of venue, the cause was transferred to the county of Wayne, where it was tried at the December term, 1889. Upon the application of Hon. W. M. Wright, county attorney for Wayne county, the district court of that county appointed Frank Fuller, the plaintiff herein, to assist in the prosecution of Kelley. The plaintiff accepted the appointment and entered upon the discharge of his duties. He assisted the county attorney during the trial, which occupied six days. Subsequently the plaintiff presented his claim for services in the sum of \$300 to the county board of Madison county, which was disallowed. An appeal was taken to the district court, where judgment was rendered for the county.

The sole question presented by the record for decision is this: When a change of venue of a criminal prosecution for a felony is taken from the county in which the offense was committed, to an adjoining county, and the county attorney of the latter, under the direction of the district court, procures an attorney to assist him in the trial, is the county from which the cause was removed liable for the services of the person thus employed? In

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the determination of this question it is necessary to examine the provisions of the statute bearing upon the subject.

By section 16, chapter 7, Compiled Statutes, it is made the duty of the person filling the office of county attorney to appear in the several courts of his county, and prosecute and defend, on behalf of the state and county, all suits, civil or criminal, arising under the laws of the state, in which the state or the county is a party, or in any manner interested.

Section 20 of the same chapter provides that "The county attorney may appoint one or more deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties; *Provided*, That the county attorney of any county may, under the direction of the district court, procure such assistance in the trial of any person, charged with the crime of felony, as he may deem necessary for the trial thereof, and such assistant or assistants shall be allowed such reasonable compensation as the county board shall determine for his services, to be paid by order on the county treasurer, upon presenting to said board the certificate of the district judge before whom said cause was tried, certifying to the services rendered by such assistant or assistants."

That it is the duty of the county attorney to represent the state in all criminal prosecutions in the district court of his county, is too plain to admit of a doubt. The duty and obligation thus imposed applies to criminal causes removed to the county upon a change of venue from an adjoining county. This was expressly ruled in *Gandy v. State*, 27 Neb., 707.

Authority for the employment of an attorney to assist the county attorney in the prosecution of felonies when deemed necessary is to be found in the proviso clause of section 20 quoted above. The language of the provision is plain and unambiguous, and will not admit of two constructions. Under the direction of the district court

the county attorney, when the public interests demand, may procure, at the expense of the county, an attorney to assist him in the trial of a criminal cause before the district court, when the offense charged is felony. Ordinarily such assistance will not be required, but in the administration of the criminal laws of the state prosecutions of great importance and magnitude sometimes arise, where the defense is represented by able counsel, and where the interests of the state require that the county attorney should have assistance. To grant relief in such cases the legislature wisely enacted the section we have copied above. Under the law, in order to create a liability against a county for services performed by an assistant to the prosecutor, his appointment must be authorized by the district court, and the judge presiding at the trial must certify to the services rendered. The record in the case at bar discloses that, in the employment of the plaintiff, both the letter and spirit of the statute were followed, and if the provisions of section 20 stood alone, we would be forced to the conclusion that the obligation to pay rested upon Wayne county, where the appointment was made and the services performed.

But we think the case is controlled by section 456 of the Criminal Code, which provides that "When the venue is changed to an adjoining county, the clerk of the court in which the indictment was found shall make a certified transcript of all the proceedings in the case, which, together with the original indictment, he shall transmit to the clerk of the court to which the venue is changed, and the trial shall be conducted in all respects as if the offender had been indicted in the county to which the venue has been changed. All costs, fees, charges, and expenses occurring from a change of venue, together with all costs, fees, charges, and expenses made or incurred in the trial of, or in keeping, guarding, and maintaining the accused, shall be paid by the county in which the indictment was found, and the clerk of the trial court shall make a statement of

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the costs, fees, charges, and expenses aforesaid, and certify and transmit the same to the clerk of the district court where the indictment was found, to be by him entered upon his docket and collected and paid as if a change of venue had not been had."

It is the policy of the law, as expressed in the section, that the county where the offense is committed shall pay all the legal costs, fees, charges, and expenses incurred in the prosecution of the offender, whether the trial takes place in the county where the information is filed or in an adjoining county upon a change of venue.

It is manifest that the legislature did not intend that the removal of a criminal case from the county in which the offense was committed to another county upon change of venue, the necessary costs, expenses and charges incurred in the prosecution of the accused, should be borne by the latter county, but should be met by the county in which the prosecution was begun. The language of section 456 is, "all costs, fees, charges, and expenses * * * made or incurred in the trial of * * * the accused shall be paid by the county in which the indictment was found."

This is sufficiently broad and comprehensive to cover expenses of the kind involved in this case. They were necessarily and lawfully incurred in the trial of a criminal cause which arose in Madison county, and it is liable for the payment thereof the same as if a change of venue had not been had.

In reaching this conclusion, we have not overlooked the opinion in the case of *Stanton County v. Madison County*, reported in 10 Neb., 304. The court in that case construed section 456 of the Criminal Code as it then existed, and ruled that upon the change of venue of a criminal case the expenses of the county in which the same was tried, for jurors, bailiffs, and use of court room, were not costs, within the meaning of the section, to be borne by the county where the indictment was found. The section

Kaserman v. Fries.

then in force provided that "the costs accruing from a change of change of venue shall be paid by the county in which the indictment was found." The section in its present form was adopted by the legislature in 1887, and is much broader than the original section. It makes the county from which the cause is removed liable for all costs, fees, charges, and expenses accruing from the change, and also those made or incurred in the trial of the accused, while such county, under the provisions of the original section, was only required to meet "the costs accruing from the change of venue." It is obvious that the case referred to is not now binding as an authority.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

LOUIS KASERMAN V. JOHN FRIES.

[FILED NOVEMBER 11, 1891.]

Parol Evidence: A WRITTEN CONTRACT CANNOT BE WAIVED, qualified, or contradicted by parol evidence of a prior or contemporaneous agreement between the parties.

ERROR to the district court for Pawnee county. Tried below before BROADY, J.

Story & Story, for plaintiff in error, cited as to the parol testimony: *Delaney v. Linder*, 22 Neb., 274; *Junge v. Bowman*, 34 N. W. Rep. [Ia.], 612; *Mason v. Mason*, Id., 208; *Scholtz v. Dankert*, 34 N. W. Rep. [Wis.], 394; *Johnson v. Glover*, 12 N. E. Rep. [Ill.], 257; *Speech v. Howard*, 16 Wall. [U.S.], 564.

33	427
45	617
33	427
54	459
55	463
55	625
33	427
57	600
33	427
61	501
61	604

J. K. Goudy, contra, cited: *Jones, Chat. Mortg.*, 705; *Epperson v. Young*, 8 Tex., 135; 1 Greenl., Ev., 305; *Barry v. Ransom*, 2 Kern. [N. Y.], 462; *Schoen v. Sunderland*, 39 Kan., 758; *Cen. M. E. Church v. Clime*, 116 Pa. St., 146; *Stout v. Weaver*, 72 Wis., 148; *Bulkley v. Devine*, 127 Ill., 407; *Norman v. Waite*, 30 Neb., 302.

NORVAL, J.

This is an action of replevin by John Fries against Louis Kaserman, to recover two horses, a lumber wagon, and a two-horse spring wagon. Upon the trial the jury found for the plaintiff.

The case, briefly stated, is as follows: On the 10th day of July, 1888, the plaintiff below, being the owner of the property in controversy, gave a chattel mortgage thereon to one B. S. Chittenden, to secure the payment of plaintiff's promissory note for \$30 of even date therewith, due in ten days. The mortgage and note were subsequently placed in the hands of Kaserman to be foreclosed, who took possession of the property under the mortgage, and the defendant in error immediately commenced this action.

B. S. Chittenden testified that while he was negotiating with Fries for some property, he loaned him \$30 to pay the expenses of getting up the papers and abstract of title, and took the note and mortgage as security. Mr. Chittenden was fully corroborated by the testimony of his son. That Fries received the money when the note and mortgage were executed is not disputed. It also appears that at the same time Chittenden entered into a written contract with Fries and wife for the purchase from them of a quarter section of land situated near Du Bois, for the agreed price of \$8,000. By the terms of the contract the consideration was to be paid as soon as Fries and wife executed a deed to the land and furnished an abstract showing a perfect chain of title. The plaintiff below testified, in effect,

that the \$30 was received as a payment on the land; that if he failed to comply with the contract he was to pay the \$30 back, and if Chittenden failed he was to forfeit the money, but if he took the property the \$30 was to be deducted from the \$8,000. The plaintiff testified that the note and mortgage were given solely to secure the repayment of the \$30 in the event that he had it to repay. This evidence was all objected to by the defendant, because it was incompetent and immaterial, being parol testimony of an agreement made at the time the note, mortgage, and the written contract for the sale of the land were executed, which contradicted them. The objection was overruled and an exception was entered on the record.

It seems to us that this testimony should have been rejected, for it tended to vary and contradict by parol the express terms of the written contract of the parties. The testimony did not in the least tend to show a want of consideration for the note and mortgage, but the object and purpose of the testimony was to prove that the money, instead of being paid in ten days, as specified in the note and mortgage, should, in a certain contingency, not be paid, but should be retained by Fries. It contradicts the terms of the written agreement of the parties for the purchase of the land. Evidence of such an oral bargain was inadmissible, for it is a firmly settled principle of law that a written contract cannot be varied, qualified, or contradicted by parol evidence of prior or contemporaneous agreements between the parties. (*Delaney v. Linder*, 22 Neb., 274; *Atherton v. Dearmond*, 33 Ia., 353; *Dickson v. Harris*, 60 Id., 727; *Mason v. Mason*, 72 Id., 457; *Hubbard v. Marshall*, 50 Wis., 322; *Scholtz v. Dankert*, 69 Id., 416.)

The verdict was not supported by the evidence. The note and mortgage were long past due and unpaid. The mortgagee was entitled to his money. The only testimony offered as defense against the note and mortgage was that above referred to relating to the alleged oral agreement,

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which should have been excluded. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CITY OF SEWARD, APPELLEE, V. JOHN CONROY ET AL.,
APPELLANTS.

[FILED NOVEMBER 18, 1891.]

1. **Cities: ANNEXING TERRITORY: ACTION OF COUNCIL.** Where a city of the second class desires to annex contiguous territory, upon the ground of material benefits and advantages to be derived from such annexation, the first step in the proceeding is the adoption by the city council of a resolution to annex such territory by a two-thirds vote of all the members elect of such council, and without this the district court has no authority in the premises.
2. **Review.** Where the record which purports to contain all the evidence fails to show that a certain resolution on which the action is based was introduced in evidence, or its admission waived, the court in considering the case must be governed by the record.

APPEAL from the district court for Seward county.
Heard below before HARRISON, J.

Norral Bros. & Lowley, for appellants, contending that the burden was upon the city to establish the facts as to the resolution: *Hassett v. Curtis*, 20 Neb., 162; *Donovan v. Fowler*, 17 Id., 247; *Maxwell's Pl. & Pr.*, 127; *Garrison v. Aultman*, 20 Neb., 311; *Aultman v. Leahey*, 24 Id., 289; *Plummer v. Shellhorn*, Id., 535.

Ed. P. Smith, and *D. C. McKillip*, *contra*, cited: *Maxwell's Pl. & Pr.*, pp. 128, 130; *Guthman v. Guthman*, 18

Neb., 105; *Natl. Ins. Co. v. Robinson*, 8 Id., 452; Bliss, Code Pl., sec. 409; 1 Chitty, Code Pl., 448; *Meunch v. Breitenbach*, 41 Ia., 527; *Goodhue v. Daniels*, 54 Id., 19; *McLimans v. Lancaster*, 23 N. W. Rep. [Wis.], 690; *People v. Crook*, 53 N. Y., 648; *Bulkley v. Big Muddy Iron Co.*, 77 Mo., 105; *Mills v. Miller*, 2 Neb., 314; *Maxwell v. Wayne Circuit Judge*, 26 N. W. Rep. [Mich.], 824; *Gott v. Brigham*, 2 Id., 6; *Gregory v. Lincoln*, 13 Neb., 352; *S. Platte L. Co. v. Buffalo Co.*, 15 Id., 605; *Grand Rapids, etc., R. Co. v. Gray*, 38 Mich., 461; *Goodrich v. Omaha*, 11 Neb., 204; *Armitage v. Sullivan*, 29 N. W. Rep. [Ia.], 399; *Evans v. Enloe*, 26 N. W. Rep. [Wis.], 170; *Babcock v. Bd. of Equalization*, 21 N. W. Rep. [Ia.], 207; *Rheiner v. R. & Tr. Co.*, 17 N. W. Rep. [Me.], 623; *Bryant v. Estabrook*, 16 Neb., 217; *Gorham v. Whitney*, 17 N. W. Rep. [Mich.], 252.

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MAXWELL, J.

This action was brought in the district court of Seward county by the plaintiff against the defendants named and a large number of other owners of real estate near the city of Seward, for the purpose of extending the limits of the city by taking in lands owned by the defendants.

It is alleged in the petition, in substance, that Seward is, and at the time stated was, a city of the second class, duly organized; that on the 4th of October, 1887, at an adjourned meeting of the city council duly held on the said day in said city, the following resolution was duly adopted by a two-thirds vote of said city council, to-wit:

“WHEREAS, The territory hereinafter described is situate contiguous to the corporate city of Seward, Nebraska, and a large portion of which territory is subdivided into parcels of ten acres or less; and

“WHEREAS, It would be materially beneficial and advantageous to said city to have the same annexed thereto, therefore,

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"Resolved, That it is the sense of this council that the contiguous territory hereinafter described be annexed to and become a part of the corporate city of Seward, Seward county, Nebraska. And be it further resolved and ordered that the city attorney be, and is hereby, instructed to prepare and present to the district court of Seward county, Nebraska, at the next term thereof, a petition in the manner prescribed by law, in the name of said city, praying that said territory be annexed to and become a part of the city of Seward, Nebraska, said territory being bounded and described as follows, to-wit:

"Commencing at the southwest corner of the city of Seward, Nebraska, and running thence due south to the south quarter corner of section 20, town 11, range 3 east; thence east on the south line of said section 20 to the southwest corner of section 21, town 11, range 3 east; thence east along the south line of said section 21, 1,950 feet, more or less, to where said line intersects the center of the channel of Blue river; thence in a southerly direction along the center of said river 720 feet, more or less, to a point where said river is not intersected by the boundary of the present Seward city limits; thence following along the southerly boundary of said city back to the point of beginning. Also commencing at the quarter corner between sections 21 and 28, town 11, range 3 east, and running thence east on the line between said sections 21 and 28, 287 feet; thence north on a line parallel with and 287 feet east of the north and south half section line through said section 21 to an intersection with the north line of said section 21; thence west 287 feet to the quarter corner between said sections 21 and 16, town 11, range 3 east; thence north along the north and south half section line through said section 16, 1,350 feet; thence west to an intersection with west line of section 16, at a point 1,320 feet north of the southwest corner of said section 16 to the southwest corner of said section 16, 1,320 feet;

thence west along the line between sections 17 and 20, town 11, range 3 east, to the northwest corner of the northwest corner of the northeast quarter of the northeast quarter of said section 20, 1,320 feet; thence south along the west line of said northeast quarter of the northeast quarter of said section 20 to an intersection with the north line of the city of Seward, Nebraska, as at present bounded, and thence following back along the north and east boundaries of the city of Seward to the place of beginning."

The vote upon the adoption of said resolution by said city council was as follows, to-wit: Those voting in favor of the adoption of said resolution: Mulfinger, Goehner, and Betzer—three votes "Yea"; and those voting against said resolution was Councilman Pence—one vote "Nay"; whereupon said resolution was then declared adopted, two thirds having voted in favor thereof, which said resolution, together with the vote thereon, was by G. F. Dickman, clerk of said city, by order of said council, duly spread upon the records of said council.

Two of the defendants, Jones and Moffett, filed separate answers, in which they admit that Seward is a city of the second class; that the persons named as officers of the city are such officers and that the defendants are the owners of the portions of land set forth in the petition, but deny all other allegations. Green and a number of other defendants joined in an answer substantially the same as that of Jones and Moffett.

The defendants below allege in substance that the lands owned by them are agricultural lands upon which they reside; that such lands are not held for purposes of speculation or to divide up in city lots or separate tracts for sale, but are held by each of said defendants as a home, etc.

On the trial of the cause the court found the issues in favor of all the defendants except Jones, Green, and Moffit, who answered, and against some of the others who had made default.

The action is brought under the provisions of section 99, chapter 14, Compiled Statutes, which reads as follows: "When any city or village shall desire to annex to its corporate limits any contiguous territory, whether such territory be in fact subdivided into tracts or parcels of ten acres or less, or be not so subdivided, the council or board of trustees of said corporation shall vote upon the question of such annexation, and if a resolution to annex such territory, describing the same in general terms, be adopted by two-thirds vote of all the members elect of such council or board of trustees, said resolution, and the vote thereon, shall be spread upon the records of said council or board. Said city or village may thereupon present to the district court of the county in which such territory lies a petition praying for the annexation of such territory, together with an accurate plat or map of the same, showing the subdivisions of said territory, if it be so subdivided, and its relative position to such a city or village; and such petition shall set forth the resolution of said council or board of trustees for annexation of the same, and the vote thereon, and also the names of the various owners of said territory, if there be more than one such owner, and shall also set forth the material benefits and advantages to be derived from such annexation. A notice of the filing of said petition shall be served upon the owner or owners of said adjacent territory in the same manner as a summons in civil actions, and in case said owner or owners be non-residents of the state, said notice shall be published in the manner provided for service by publication in civil actions. Issues shall be joined and the cause tried in the same manner, as nearly as may be, as provided for trial of causes under the Code of Civil Procedure, except that no judgment for costs shall be rendered against any defendant who does not make any defense. If the court finds the allegations of the petition to be true, and that such territory, or any part thereof, would receive

material benefit by its annexation to such corporation, or that justice and equity require such annexation of said territory or any part thereof, a decree shall be entered accordingly; and a copy of the decree of said court duly certified under the seal thereof, together with a plat of the territory with a proper description thereof so decreed to be annexed, and in case the same is already subdivided, showing the same subdivided into blocks and lots to correspond as near as may be with the fact, and as near as may be with the lots, blocks, and streets of the adjacent city or village, and corresponding as near as may be to the provisions of said act, under the title of 'City and Village Plats,' shall be filed and recorded in the office of the county clerk or recorder of the county in which such territory lies, and from the time of filing of such decree and plat, the territory therein described shall be included in and become a part of such city or village, and the inhabitants thereof shall receive the benefits of and be subject to the ordinances and regulations of such city or village; *Provided*, That appeals may be taken from the proceedings aforesaid in the district court, as in other civil cases, but notice of appeal must be given immediately on the entering of the decree in said district court, and the filing of the said decree and plat in the county clerk's office shall be stayed to abide the event of such appeal, and in case such appeal be not perfected, said corporation may file said decree and plat as hereinbefore provided for, without being prejudiced by lapse of time. On the filing of such decree and plat the council or board of trustees shall pass an ordinance declaring such territory to be annexed to such city or village, and extending the corporate limits thereof accordingly, and file a certified copy of the same in the clerk's office."

It will be seen that the first step in the proceedings is the adoption of a resolution by the city council. The language is, "When any city or village shall desire to annex to its corporate limits any contiguous territory, * * *

City of Seward v. Conroy.

the council or board of trustees of said corporation shall vote upon the question of such annexation, and if a resolution to annex such territory, describing the same in general terms, be adopted by a two-thirds vote of all the members elect of said council or board of trustees, * * * said city may thereupon present to the district court," etc., "a petition praying for the annexation of such territory." The adoption of the resolution therefore is the first step in the proceedings, without which the district court has no jurisdiction whatever. It is denied in the answers of the defendants that any such resolution was adopted by the city council, and there is no proof of it in the record.

It is claimed that the passage of the resolution was admitted on the trial. If so, the record fails to show such admission. This court must be governed by the record as sent up from the court below. That, when duly certified, is presumed to contain all the evidence. If through some mistake or oversight it does not, this court cannot allow presumptions of fact to take the place of evidence. The question of the resolution does not appear to have been raised in the court below; nevertheless it was not, so far as this record discloses, introduced in evidence, nor was its existence admitted. This being so, the court had no proof before it to justify its decree.

The question of the authority of the court to act in the premises was determined by this court in *Wahoo v. Dickinson*, 23 Neb., 426. In that case the record showed a resolution as the foundation of the action and it was sustained; but we have no such record. The judgment is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

COBB, CH. J., concurs.

NORVAL, J., did not sit, and took no part in the decision.

Stehr v. Raben.

FREDERICK STEHR, APPELLEE, v. JOHN RABEN ET AL.,
APPELLANTS.

33	437
86	344

[FILED NOVEMBER 18, 1891.]

Party Walls: AGREEMENT BINDS PURCHASERS. An agreement between adjoining owners in relation to a party wall erected on the division lines of their lots is binding on the parties and those who purchase subject to such agreement, and creates an equitable charge upon the lots.

APPEAL from the district court for Hall county. Heard below before HARRISON, J.

Sedgwick & Power, for appellants, cited: *McCourt v. McCabe*, 1 N. W. Rep. [Wis.], 192; *Andrea v. Haseltine*, 17 Id., 16; *Guttenberger v. Woods*, 51 Cal., 523; *Gibson v. Holden*, 3 N. E. Rep. [Ill.], 282.

Abbott & Caldwell, contra.

MAXWELL, J.

This action was brought upon a promissory note, as follows:

"\$374. GRAND ISLAND, 11-20-1886.

"One year after date we promise to pay to the order of Stehr Bros. three hundred and seventy-four dollars, at Grand Island, Neb., value received, with interest at ten per cent from date.

JOHN RABEN,
"CHAS. IVERS."

It is alleged in the petition, in substance, that one Henry Stehr and the plaintiff on the 30th day of November, 1888, were the owners of the east one-third of lot 3, in block 80, in the city of Grand Island; that the center third was owned by John Wallicks; that by arrangement between the Stehr Bros. and Wallicks, the former, in erect-

Stehr v. Raben.

ing a brick building on their lot, built one-half of the west wall thereof on the lot owned by Wallicks, under an agreement that when Wallicks or his grantee erected a building on his lot he should then pay for one-half of the party wall.

About the time the note in question was given, John Raben purchased that portion of the lot owned by Wallicks, with knowledge of the above contract, and took the title in the name of his wife. Thereupon Raben begun the erection of a building on said lot, and after employing certain builders to estimate the value of one-half of the party wall found that the estimated value thereof was \$374, upon which he executed the note in question. The Stehr Bros. do not appear to have been aware at this time that Raben had taken the title in the name of his wife.

On the trial of the cause the court rendered a decree as follows:

"This day comes again the plaintiff by O. A. Abbott, his attorney, and the defendants by J. H. Smith, their attorney, and this cause came on to be heard on the issues joined between the parties and the evidence, and the court, after hearing the evidence and arguments of counsel, and being fully advised in the premises, do find that the note set out and described in the plaintiff's petition was made by the said John Raben in consideration for the use and convenience of a partition wall described in the plaintiff's petition; that at the time of the execution and delivery of said note, said John Raben was the husband of the defendant Alvine Raben and was acting in her behalf, and that the purchase of said wall and the giving of said note were each for the use and benefit of the said Alvine Raben. At the time of the giving of said note said plaintiff did not know for whom said wall was being purchased; that said note has never been paid nor has said Alvine Raben ever paid to the plaintiff or any other person any money or other consideration for the use and benefit of said wall;

that the defendant Alvine Raben constructed her building as alleged in the plaintiff's petition, using said wall as a partition wall; that said wall is necessary for the support of said building; that the separation and removal thereof or the separation of the rest of said building from said wall would destroy the same.

"And the court do further find that the amount due on said note is the sum of \$477.80, and that said sum bears interest at the rate of ten per cent per annum; and that said plaintiff is entitled to a lien on said wall and all of that portion of the lot on which said described wall stands, to secure the payment of the amount now due on said note or hereafter to grow due, and the costs of this proceeding.

"It is therefore ordered, adjudged, and decreed that the said plaintiff do have and recover of and from the said John Raben and Alvine Raben the said sum of \$477.80, so found due as aforesaid, with interest thereon from the 10th day of September, A. D. 1889, at the rate of ten per cent per annum, together with his costs about this suit in his behalf expended and taxed to the sum of \$31.50.

"And it is further ordered, adjudged and decreed that in case the said defendants fail for twenty days from this date to pay the plaintiff the said sum of \$477.80 so found due as aforesaid with interest as aforesaid, and costs taxed as aforesaid, that an order issue to the sheriff of Hall county commanding him to cause the west half of said wall, together with so much of the center one-third of lot 3 in block 80 of the original town, now city, of Grand Island as is covered by said wall, to-wit, a strip of land seven inches in width off the west side of the center one-third of lot 3 in block 80, to be appraised and sold according to law, and out of the proceeds of said sale pay, first, the costs of this proceeding; second, pay the plaintiff the sum so found due as aforesaid, with interest, cost and increase costs, and pay the residue thereof into court to await its further order in the premises."

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The right of the plaintiff to recover upon the note in controversy is not seriously questioned, and such a contract "creates an equitable charge, easement, and servitude upon the lots built upon." (*Keating v. Korfhage*, 88 Mo., 524; *Mackey v. Harmon*, 34 Minn., 168; *Burr v. Lamaster*, 30 Neb., 688.)

This question, in another form, was before this court in *Burr v. Lamaster*, *supra*, and it was held, in substance, after a careful consideration of the cases for and against the proposition, that a contract of this kind attaches to the land, and in certain contingencies will be an incumbrance upon it.

The judgment is right and is

AFFIRMED.

THE other judges concur.

R. C. PATTERSON V. W. E. HAWLEY ET AL.

[FILED NOVEMBER 18, 1891.]

1. **Vendor and Vendee: ACTION FOR PURCHASE MONEY.** One H. owned certain real estate which he sold to P. and H. for \$20,000. P. was to have an undivided one-third part and H. two-thirds. P. gave his check to H. for \$300, and afterwards gave another check for \$1,700, which, with other obligations, completed his portion of the payment. H. contends that thereupon he agreed with P. to return the checks in question to him, provided he would reconvey one-half of his interest in the land, while P. contends that the checks were cashed by him, he paying \$1,700 for them. In an action by H. against P. to recover the face value of the checks, *held*, that the action was not one to enforce a parol contract for the sale of real estate, but to recover the purchase money.
2. **The verdict is sustained by the clear weight of evidence.**
3. **Remarks of an attorney held to be improper, but as the verdict is right it will not be set aside.**

ERROR to the district court for Douglas county. Tried below before CLARKSON, J.

George W. Corell, for plaintiff in error.

H. B. Irwin, *contra*.

MAXWELL, J.

This action was brought in the district court of Douglas county by the defendants in error against the plaintiff in error to recover the sum of \$2,000, with interest from the 23d day of December, 1886, and costs.

On the trial of the cause the jury returned a verdict in favor of the defendants in error and against the plaintiff in error for the sum of \$2,468, and a motion for a new trial having been overruled, judgment was entered on the verdict.

It is alleged, in substance, in the petition that on the 23d day of December, 1886, the plaintiffs below were the owners of the east half of the southeast quarter of the southeast quarter of section 9, town 14, range 13 east, in Douglas county, Nebraska, and that on that day the defendant below, R. C. Patterson, and one Jonas R. Harris purchased of them for \$20,000 said tract of land. Patterson contracted for the undivided one-third thereof and agreed to pay one-third of the purchase money, and Harris contracted for the undivided two-thirds thereof and agreed to pay two-thirds of the purchase money, of which \$6,000 were to be paid in cash, \$3,000 in notes of \$1,000 each, due in one, two, and three years, and \$11,000 of mortgage incumbrance on the land to Morris Morrison, to be assumed by the purchasers. That to "bind the bargain" R. C. Patterson gave his check for \$300 and J. R. Harris his check for \$200 to the plaintiffs below; that on December 23, 1886, plaintiffs executed and delivered to Patterson and Harris a deed to said real estate, con-

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veying to Patterson an undivided one-third part thereof and Harris an undivided two-thirds thereof, and received from Patterson on that day a check for the sum of \$1,700 and from Harris on same day a check for \$3,800 to complete the cash payment of \$6,000; that Patterson executed and delivered to them their three notes of \$1,000 each and assumed the payment of the mortgage to Morris Morrison of \$11,000, completing the payments in full for said property; that before the checks of \$300 and \$1,700, which had been executed and delivered by Patterson to plaintiffs below, had been presented to the bank for payment, to-wit, on the 23d day of December, 1886, an oral agreement was entered into between Patterson and the plaintiffs below that in consideration of the unpaid checks being returned to him, he, Patterson, would reconvey to the plaintiffs one-half of his undivided one third interest in the said property free from any and all incumbrances whatever; that in pursuance of that agreement the plaintiffs returned to Patterson on the 23d day of December, 1886, the said unpaid checks, to-wit, one for \$300 and one for \$1,700, but that he has not reconveyed, and still refuses to reconvey, to the plaintiffs the one-half of his undivided one-third interest in said property, although often requested so to do; that he also refused, and still refuses, to return said unpaid checks, to-wit, the one for \$300 and one for \$1,700, to plaintiffs, though he has often been requested so to do. Wherefore judgment is prayed for the amount of the checks and interest.

A demurrer was interposed to the plaintiffs' petition, which was overruled.

An answer was then filed by Patterson denying that on December 23, 1886, or at any other time, an agreement was entered into between him and plaintiffs that in consideration of the checks mentioned in the petition, to-wit, the check of \$300 and the check of \$1,700, being returned to him by plaintiffs he would reconvey to plaintiff-

iffs one-half of his undivided interest in said property mentioned in petition free from any and all incumbrances whatever, and denying that he agreed to convey or reconvey to plaintiffs any interest in said property mentioned in petition. He further denies that said plaintiffs returned said checks, to-wit, the one for \$300 and the one for \$1,700, to him in pursuance of the alleged agreement set forth in petition. He then alleges that all the negotiations had, and all the business done by him in regard to the purchase of the real estate mentioned in petition by him and Harris, was had and done by him with William E. Hawley only, and that none was had or done by him with Archer and Sobotker, or with either of them; that he was not informed and did not know, until at or about the time the deed of the real estate executed by plaintiffs to him and Harris was delivered, that Archer and Sobotker had any interest in said real estate, and he did not then, nor at the time the two checks, one of \$300 and the other of \$1,700, were delivered by Hawley to him, know but that whatever interest in said real estate was held by Archer and Sobotker was held by them for the benefit of William E. Hawley, the bargain for the purchase of said property being wholly made with William E. Hawley.

He further alleges that when the said checks mentioned in petition, to-wit, one of \$300 and one of \$1,700, were executed by him, he delivered them to William E. Hawley; that the \$300 check was made payable to the order of William E. Hawley, and the \$1,700 was made payable, at the request of William E. Hawley, to the order of one Morris Morrison; that after the deed conveying said real estate to him and Harris had been delivered by William E. Hawley, and said checks had been delivered by him to said Hawley, he, Hawley, soon thereafter came to him, having the two checks in his possession, and the indorsement of Morris Morrison on the \$1,700 check, and asked him to cash them; that he at first refused to cash them,

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whereupon Hawley offered and agreed with him that if he would then give him, Hawley, \$1,700 in cash, he, Hawley, would accept that sum in payment of both checks, and would transfer and surrender said checks to him; that he did then and there pay to said Hawley \$1,700 in cash, and said Hawley accepted the same, and then and there, in consideration thereof, in pursuance of said agreement, transferred and delivered said checks to him and accepted said sum of \$1,700 in full payment of said checks.

Plaintiffs replied by general denial.

The plaintiff in error contends that the gravamen of the action is the breach of a parol contract for the sale and conveyance of real estate, and therefore the contract cannot be enforced. It is evident, however, that the plaintiff in error is mistaken. If the allegations of the petition are true, the plaintiff in error received the consideration for certain real estate which he had agreed orally to convey to the defendants in error, but after having received such consideration he retained the same and refused to perform the contract. This he cannot do. He must convey the land or return the consideration.

The plaintiff in error contends that he cashed the checks in question and he accounts for his possession of them in that way. His explanation is not very satisfactory, and in any event was testimony to be submitted to the jury. In our view the evidence fully warrants the verdict.

This being an action to recover the money paid for the land, it is not material whether the plaintiff in error knew of the interest of Archer and Sobotker in the contract or not.

In his opening address to the jury the attorney for the defendants in error cast some reflections upon the plaintiff in error. Objections were promptly made and the court required the attorney to avoid personal remarks. We do not care to copy the language used and thus make a permanent record of what was said in the heat of argument.

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Cases are to be tried upon the merits. When the character of a party is not in issue in a case no reference should be made to it. The question is not whether he is a good or bad man, but what are his rights in that case, and the court should see to it that the trial is confined to questions before the court. All appeals to the jury upon matters outside of the case tend to defeat the due administration of justice, and any statement of an alleged fact outside of the evidence prejudicial to one of the parties, may be sufficient to cause a reversal of the judgment. A court of justice does not condemn unheard, nor upon *ex parte* statements of opposing counsel, and it will not permit one of its officers to abuse his position by such unauthorized statements. We are satisfied, however, that the verdict in this case is the only one that the jury should have returned under the evidence and the error will be disregarded. The judgment is right and is

• AFFIRMED.

THE other judges concur.

FARMERS BANK V. G. W. HARSHMAN.

[FILED NOVEMBER 18, 1891.]

33	445
53	755
33	445
58	14

Instructions: ACTION ON PROMISSORY NOTE. In an action to recover upon a note which the plaintiff claimed had been canceled by mistake without being paid, and delivered to the defendant, and the defendant claimed that he had paid the same, two of the instructions given were inconsistent with each other as to the burden of proof, and therefore erroneous.

ERROR to the district court for Otoe county. Tried below before CHAPMAN, J.

M. L. Hayward, for plaintiff in error, cited, as to the fourth and fifth instructions: *Paine v. Kohl*, 14 Neb., 580; *Markel v. Moudy*, 11 Id., 219; *Eaton v. Carruth*, Id., 234; *Kersenbrock v. Martin*, 12 Id., 376; *U. P. R. Co. v. Ogilvy*, 18 Id., 639; *Morse v. Traynor*, 26 Id., 599; *Deitrich v. Hutchinson*, 20 Id., 52; *Merredith v. Kennard*, 1 Id., 312; *Harrison v. Baker*, 15 Id., 46; *Howell v. Sewing Mach. Co.*, 12 Id., 184; *Matthewson v. Burr*, 6 Id., 321; *Steele v. Russell*, 5 Id., 215; *Camp v. Sturdevant*, 16 Id., 695; *Newton Wagon Co. v. Diers*, 10 Id., 291; *Galloway v. Hicks*, 26 Id., 536; *Fitzgerald v. Meyer*, 25 Id., 82; *McPherson v. Wiswell*, 19 Id., 117.

John C. Watson, *contra*.

MAXWELL, J.

This action was brought in the district court of Otoe county to recover the sum of \$1,009 and interest thereon. The cause of action is stated as follows:

"For a cause of action herein the plaintiff says that at Nebraska City, Nebraska, on the 8th day of August, A. D. 1888, the above named defendant, George W. Harshman, made, executed, and delivered to the above named plaintiff his certain promissory note in writing bearing that date, whereby for value received he promised on September 11, 1888, after the date of said note, to pay to the said plaintiff the sum of one thousand nine and $\frac{17}{100}$ dollars, with interest on said sum at the rate of ten per cent per annum from the maturity of said note until the same should be paid, together with a sum equal to ten per cent of said amount as a reasonable attorney's fee in case of action on said note, and that no part of the principal or interest of said note has ever been collected or paid; that plaintiff cannot attach a copy of said note hereto, because heretofore, and on September 21, 1888, one of plaintiff's clerks, in delivering

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to defendant two other notes by him paid on said day, by a blunder and accident handed defendant the three notes instead of two, all being pinned together, the two he then paid and the one herein sued upon, and defendant now has said note, although it is wholly unpaid; that there is now due plaintiff from defendant on said note the sum of \$1,009.17, with ten per cent interest from September 11, 1888."

The defendant in his answer "admits that the plaintiff is a banking corporation, and is duly organized under the laws of the state of Nebraska, and is doing a banking business at Nebraska City, in Otoe county, under the name of 'The Farmers Bank.'

"Second—That he executed to said plaintiff the note sued on in its petition, as in plaintiff's petition alleged, and that the date of said note was on the 9th day of August, 1888, and was for the sum of \$1,009.17, and that said note was due thirty days after date, with ten per cent interest from maturity.

"Third—That on the 19th day of September, 1888, this defendant paid said note in full to said bank, and said plaintiff bank canceled and surrendered said note to this defendant, and the same was then and there fully paid and satisfied, and duly delivered to this defendant."

In the reply the plaintiff alleges that although three notes were stamped as paid by mistake, yet, in fact, the defendant did not pay the note in suit.

On the trial of the cause the jury returned a verdict for the defendant, and a motion for a new trial having been overruled, judgment was entered on the verdict, dismissing the action.

The court instructed the jury as follows:

"Plaintiff alleges, in substance, that on the 8th day of August, 1888, defendant made and delivered his promissory note to plaintiff in writing, of that date, whereby he promised to pay to plaintiff the sum of \$1,009.17, with

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interest at the rate of ten per cent per annum, and that afterwards, and on the 21st day of September, the plaintiff, in delivering to defendant two other certain promissory notes, by mistake delivered to defendant the note of date August, 1888, calling for the payment of the said sum of \$1,009.17; that said promissory note has never been paid, and that defendant refuses to pay the same. To this petition of the plaintiff the defendant has answered, admitting the execution of the note in controversy, and alleges that on the 29th day of September, 1888, he paid said promissory note in full to the plaintiff.

"First—You are instructed, gentlemen, that upon the issues thus presented by the pleadings the burden of proof is upon the defendant to satisfy you by a preponderance of the evidence that he paid the note in controversy in this action, and upon the plaintiff to satisfy you by a preponderance of the evidence that the promissory note in dispute was by mistake delivered to defendant without consideration therefor.

"Second—If you believe from the evidence that defendant did not pay the note in question, but that it came into his possession by mistake, your verdict should be in favor of the plaintiff for the amount you find remaining due and unpaid upon said note, with interest at ten per cent from maturity. If you find that defendant has paid the said note, as alleged in his answer, and as testified to by himself upon the witness stand, your verdict shall be in favor of the defendant.

"Third—You are further instructed that it is incumbent upon the defendant Harshman to prove by a preponderance of the evidence that he paid the note in question, but you are further instructed that if you find from the evidence that the note in question is in the possession of the defendant Harshman, and that such note was stamped 'Paid,' upon its face by the plaintiff's bank, to whom it was made payable, and you further find that the note in question

came honestly into the possession of the defendant, such facts are *prima facie* evidence of the payment of such note, and is a fact proper to be taken into consideration in determining the question as to whether it was delivered to him by mistake, as alleged in the plaintiff's petition and as testified to by the agents and officers of said bank.

"Fourth—You are further instructed that the evidence showing that the note in controversy was delivered to defendant with the cancellation stamp of the plaintiff bank upon its face, and it being admitted upon the trial that it was delivered to defendant by the agents and servants of the plaintiff in the regular course of its business, the burden of proof is shifted from the defendant to the plaintiffs to satisfy you by a preponderance of the evidence that the defendant did not pay the same, but that, as a matter of fact, the delivery of the same and the cancellation thereof was a mistake and error upon the part of the plaintiff.

"Fifth—You are the sole judges of the evidence submitted to you, and it is your duty to fairly and fully consider the same and harmonize it when it can consistently be harmonized, and a true verdict render between the parties to the controversy."

The defendant seems to have claimed the right to open and close, thereby undertaking to convince the jury that he had paid the note in question. The instructions in question in one part state that the burden is upon the plaintiff, and in another part that it was upon the defendant. In this regard they are calculated to confuse the jury. Unless the defendant admits that he received the note without paying it, it would devolve on the plaintiff to show by a preponderance of the evidence that the note had been marked "Paid" by mistake. The defendant claims that he paid the note in suit and two others largely by checks, so that it can readily be ascertained whether or not payment has actually been made.

Two of the instructions given are inconsistent with each

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other, and may have misled the jury, and are therefore erroneous. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

S. H. WATSON V. JOHN TROMBLE.

[FILED NOVEMBER 18, 1891.]

Judicial Sales: ERRORS CURED BY CONFIRMATION. An order confirming a sale of real estate by a court having jurisdiction of the parties and subject-matter, in the absence of fraud, cures all defects and irregularities in the appraisement and is conclusive upon all the parties to the suit and those claiming under them, until reversed or set aside.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

Byron Clark, for plaintiff in error.

W. L. Browne, and *E. H. Wooley*, *contra*.

NORVAL, J.

The plaintiff in error was plaintiff in the court below. A general demurrer was sustained to the petition, and the action dismissed. The petition contained two counts.

As a first cause of action it is alleged, in effect, that the plaintiff, on and prior to May 1, 1888, was the owner of the east half of the northwest quarter and the north half of the southwest quarter of section 35, township 10 north, of range 12, in Cass county; that on said date, in a suit pending in the district court of said county, wherein Deere,

Wells & Co. were plaintiffs, and the plaintiff herein and one John W. Clarke were defendants, a decree was entered foreclosing two mortgages on said real estate, one in favor of Deere, Wells & Co. for \$126.50, and the other in favor of said John W. Clarke for \$263.70, the decree bearing interest at ten per cent from its date; that an order of sale was subsequently issued, the real estate above described was appraised, advertised, and sold, which sale was duly reported to the court and by it confirmed; that William L. Browne was the purchaser at the sale, but that the defendant John Tromble has since purchased said land and is now the owner thereof; that the officer, in making the appraisal, deducted from the gross appraised value of the land all incumbrances thereon, including the amount of the above liens, for the satisfaction of which the sale was made, that by reason thereof the plaintiff is entitled to recover from the defendant the amount of said liens, with interest thereon, and that the same be decreed a lien upon said real estate.

In the second count it is alleged, in substance, that on the 17th day of March, 1887, but prior to the time plaintiff purchased said real estate, one Rebecca Watson had a dower interest therein, and on said date executed, acknowledged, and delivered her certain mortgage deed, whereby she conveyed to Thomas M. Howard and John W. Clarke, to secure the payment of her four promissory notes, aggregating \$500, which said mortgage was duly recorded on the 19th day of March, 1887, and the real estate therein described was sold under the decree of foreclosure mentioned in the first count of the petition; that the sheriff, in appraising said land for the purpose of sale under said decree, deducted as a lien the amount of the above described mortgage, although long prior to such appraisal the plaintiff herein had purchased said real estate subject to said mortgage and had paid the same to said John W. Clarke and Thomas M. Howard, but the release had not at the time of

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said appraisement, nor has it yet, been placed upon record to show that said mortgage had been satisfied, so that when said appraisement was made, and from thence to the present time, said mortgage appears as a valid and subsisting lien upon said real estate; that the mortgage and the notes thereby secured have been assigned and delivered to the plaintiff herein.

The plaintiff prays that he be subrogated to the rights of Clarke and Howard in said mortgage, and for a decree of foreclosure and sale.

Plaintiff's causes of action are based upon certain alleged errors in the appraisement and sale of his real estate under a decree of foreclosure. In order to prevent the real estate of a debtor from being sacrificed at judicial sales the legislature has provided for the appraisement of the interest of the debtor therein, and that it shall not be sold at less than two-thirds of its appraised value. In making the appraisement it is the duty of the officer and the appraisers selected by him to deduct from the real value of the lands and tenements to be sold, the amount of all liens and incumbrances existing thereon prior to the lien of the judgment. The interest of the debtor is the difference between the gross value of his property levied upon and the amount of such liens. For the purpose of ascertaining the amount of liens upon the land, it is made the duty of the county clerk, the clerk of the district court, and the county treasurer of the county where the land is situated, upon written application of the sheriff, to certify to him officially the amount and character of all liens existing against the real estate which are prior to the lien of the judgment, to satisfy which the sale is to be had. It is clear that, under the provisions of our statute and the decisions of this court, the appraisers had no authority to treat as liens the amounts due on the mortgages mentioned in the plaintiff's first cause of action, and under which the sale was made. (*Drew v. Kirkham et al.*, 8 Neb., 481.)

It appears from the allegations contained in the second count of the petition that in appraising the property there was deducted as a lien a \$500 mortgage which had previously been paid, but had not been satisfied upon the record. It was an apparent lien, and while it was included in the certificate of the county clerk as an incumbrance upon the land, the certificate was not conclusive upon Watson. He could have resisted the confirmation of the sale and shown that the mortgage debt had been paid, and no lien in fact existed. Had such steps been taken, or had he filed exceptions to the report of sale, on the ground the mortgages under which the sale was had were deducted as liens by the appraisers, it would have been the duty of the court to have set aside the appraisement and sale, in case it appeared that the debtor was prejudiced by the deduction as liens of the amounts of these mortgages. The petition contains no allegation as to the gross value of the real estate sold under the decree, what the interest of the debtor therein was appraised at, nor what amount it brought at the sale. For aught that appears in this record the property sold for a sum equal to or more than two-thirds of the gross appraisement. If so, Watson was not in any way prejudiced by the action of the appraisers. (*Drew v. Kirkham, supra.*)

The plaintiff Watson was a party to the foreclosure suit, and should have urged his objections to the appraisement before the confirmation of sale. No excuse is given for his not having done so, nor is there any charge of fraud or collusion. No fraud being alleged, it must be held that the order of confirmation cured all defects and errors in the appraisement and sale, and that the purchaser acquired all the title of the judgment debtor in the property. (*Neligh v. Keene*, 16 Neb., 407; *Wilcox v. Raben*, 24 Id., 368.) It follows that no cause of action is stated in either count of the petition, and the demurrer was rightly sustained. The judgment is

AFFIRMED.

THE other judges concur.

JAMES CONWAY V. ST. JOSEPH IRON CO.

[FILED NOVEMBER 18, 1891.]

1. **Judgment Creditors: ENTITLED TO PROPERTY COVERED BY UNRECORDED BILL OF SALE.** Where a bill of sale given as security for a debt is not filed as the law directs to make it effective as to creditors, the property covered by it is liable to seizure in satisfaction of a judgment against the seller, while the property remains in his possession.
2. **Review.** A verdict clearly against the weight of the evidence will be set aside.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

Daniel F. Osgood, for plaintiff in error.

S. P. Davidson, *contra*.

NORVAL, J.

This action was brought by the defendant in error to recover possession of 1,000 feet of hardwood lumber, 500 feet of poplar lumber, one harrow, and two harrow frames. The property was taken under the writ and the possession delivered to the plaintiff below. The answer of the defendant was a general denial. A trial was had to a jury, which resulted in a verdict in favor of the plaintiff, assessing its damages at five cents. The defendant's motion for a new trial was overruled and judgment rendered on the verdict.

The first assignment in the petition in error, as well as in the motion for a new trial, is that the verdict is not sustained by sufficient evidence. The record discloses that at the commencement of the suit the property was in the possession of the plaintiff in error as constable, who had taken it under and by virtue of an execution issued

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against one Erhardt Seiss. At the time of the levy the property was in the possession of the defendant in execution. The plaintiff below claims the property under a bill of sale from Mr. Seiss executed prior to the levy made by the constable, but which had not been recorded.

The proofs show that on and prior to July 26, 1886, Erhardt Seiss was engaged in business in Elk Creek, Johnson county, and on that day, being indebted to the St. Joseph Iron Co. for goods sold and delivered, executed to it a bill of sale of certain described personal property, including the property in controversy, for the expressed consideration of \$164.62. The testimony of W. S. Bristol is to the effect that, as salesman and collector for the defendant in error, the property was turned over to him by Mr. Seiss in satisfaction of the debt, and thereupon the witness appointed Mr. Seiss as agent for the company to carry on the business, who was left in possession of the property.

Upon the trial it was established by numerous witnesses that the business was continued by Mr. Seiss in his own name, selling in the ordinary course of business, and buying goods to replenish the stock. It also appears that, long after the making of the bill of sale, Mr. Seiss executed to the defendant in error a chattel mortgage on the stock, which was placed upon record. While there is testimony to show that the mortgage was never accepted by the company, it tends to show that the mortgagor regarded himself as owner of the property. It also appears in the testimony, and is uncontradicted, that after the levy of the execution, and just prior to the bringing of this suit, Mr. Wileman, the president of the company, stated to the plaintiff in error and Mr. Osgood, "that Seiss owed the St. Joseph Iron Company, but if he would pay them off they had no lien whatever against the stock that was there." This statement is entirely inconsistent with the position now insisted upon by the defendant in error,

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that it is the absolute owner of goods replevied. The testimony is overwhelming against the finding of the jury that plaintiff below was the owner of the property at the commencement of the action.

The evidence shows that the bill of sale was in effect a chattel mortgage, and not being filed as the law requires to make it effective as to creditors, the property covered by it was liable to seizure on execution while it remained in the possession of Seiss. The plaintiff in error having by lawful seizure acquired a lien upon the property, his right to possession is superior to the claim of the St. Joseph Iron Company under the bill of sale.

The conclusion reached makes it unnecessary to notice the other errors assigned. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

SARAH FULTON V. RYAN BROS.

[FILED NOVEMBER 18, 1891.]

Justice of the Peace: APPEAL: FILING TRANSCRIPT. Where a transcript of a judgment rendered in a justice court is filed by either party in the district court within thirty days from the date of the judgment, the appellate court will thereby acquire jurisdiction of the case, although the transcript is not full and complete.

ERROR to the district court for Gage county. Tried below before APPELGET, J.

A. Hardy, for plaintiff in error, cited: *Muldoon v. Levi*, 25 Neb., 459; *U. P. R. Co. v. Marston*, 22 Id., 721.

Griggs, Rinaker & Bibb, contra, cited: *Oppenheimer v. McClay*, 30 Neb., 654.

NORVAL, J.

On the 2d day of October, 1890, the defendants in error recovered a judgment on a promissory note in a justice court against the plaintiff in error for \$174.16, and costs of suit. On the 7th day of the same month there was filed in the office of the clerk of the district court a certified transcript of the judgment. On the 11th day of October the plaintiff in error filed with the justice of the peace an appeal bond, which was duly approved by the justice, and on the 8th day of November, 1890, plaintiff in error filed a transcript of said judgment, including the appeal undertaking, with the clerk of the district court. On November 24, 1890, the defendant in error filed with the clerk of said court a motion to dismiss the appeal for the reason that the same was not taken, perfected, and transcript filed within the time required by law, which motion was sustained by the court and the appeal dismissed. This ruling of the court is assigned for error. -

Section 1007 of the Code requires the party appealing from a judgment of a justice of the peace to enter into an undertaking to the adverse party within ten days from the rendition of the judgment. The defendant in every respect complied with this provision of the statute. To perfect an appeal, other sections of the Code require that a transcript of the judgment, including the appeal undertaking, be delivered to the clerk of the district court of the proper county within thirty days after the judgment was rendered.

It is urged that the action of the district court in dismissing the appeal is justified by section 1011 of the Code, which provides that "If the appellant shall fail to deliver the transcript and other papers, if any, to the clerk, and have his appeal docketed as aforesaid, within thirty days

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next following the rendition of said judgment, the appellee may, at the first term of the district court after the expiration of thirty days, file a transcript of the proceedings of such justice, and the said cause shall, on motion of said appellee, be docketed, and the court is authorized and required, on his application, either to enter up a judgment in his favor similar to that entered by the justice of the peace, and for all costs that have accrued in the court, and award execution thereon, or such court may, with the consent of such appellee, dismiss the appeal," etc.

Two transcripts of the judgment of the justice of the peace were filed in the district court. If the one last delivered to the clerk of said court is alone to be considered, then the appeal was rightly dismissed, for the reason that such transcript was filed more than thirty days after the rendition of the judgment appealed from. The other transcript was filed five days after the judgment was rendered, but it is contended by the defendants in error that they presented the same to the clerk for filing, in order to make the judgment a lien on the real estate of the plaintiff in error, under sections 561 and 562 of the Code. While the sections authorize the filing of a transcript by the successful party, for the purpose of making it a lien upon the real estate of the judgment debtor, there is nothing in the record before us to show who presented the transcript for filing, or that the case was ever entered upon the execution docket as is required by section 561, to make it a lien upon real estate.

In our view it is quite immaterial who filed the transcript, or the object of its filing. When filed in the district court for one purpose it is available for all the uses and purposes to which another transcript of the same judgment could be put to in that court. When a transcript is filed by either party to a judgment in time to perfect an appeal, the appellate court acquires jurisdiction thereby. As said by this court in *Muldoon v. Levi*, 25 Neb., 459:

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"There can be no good reason assigned for requiring two transcripts to be on file before the district court can make either of the orders referred to. The law does not require an unnecessary thing. The transcript being on file the court would have jurisdiction." (See also *U. P. R. Co. v. Marston*, 22 Neb., 721; *Johnson v. Van Cleve*, 23 Id., 559.)

When the first transcript was filed no appeal bond had been given, but within the period allowed by law an appeal undertaking was filed and approved by the justice. While its giving and approving were necessary to confer jurisdiction upon the appellate court, it was not indispensable to jurisdiction that a copy of the undertaking should be filed in such court within thirty days after the rendition of judgment. A complete transcript includes a copy of the appeal bond. But suppose an imperfect one is filed in time, as was the first one in this case, would not the appellate court acquire jurisdiction to order a perfect transcript sent up? There can be no doubt of it. To our mind it appears illogical to say that the district court obtained jurisdiction for such purpose, but lost jurisdiction when the complete transcript was filed. That no order of the court was taken against the justice to send up a perfect transcript is quite immaterial. The same purpose was accomplished by its being voluntarily furnished. When a transcript is filed in time, although incomplete, the appellate court acquires jurisdiction of the case. (*N. & C. R. Co. v. Storer*, 22 Neb., 90; *Schuyler v. Hanna*, 28 Id., 601.)

The district court erred in dismissing the appeal. The judgment is reversed and the cause remanded, with directions to reinstate the appeal and for further proceedings according to law.

JUDGMENT ACCORDINGLY.

THE other judges concur.

33 460
o40 266CHARLES M. RICE, APPELLANT, v. E. C. GIBBS,
APPELLEE.

[FILED NOVEMBER 25, 1891.]

1. Real Estate: CONTRACT FOR SALE: OPTION: ASSIGNABILITY.

E. C. G. executed her agreement in writing with F. A. A. for the consideration of \$5 to execute and convey to him, at any time within five months, upon his request in writing, certain real estate in the town of Kearney, upon payment of \$3,500 as follows: \$1,500 on the execution of the deed, \$1,000 in one year, and \$1,000 in two years, with interest at ten per cent on the deferred payments, with covenant in favor of the heirs, executors, administrators, and assigns, obligatory upon the respective parties. The agreement was assigned to C. M. R. for value, who, by responsible agent elected to purchase the property, tendered payment of the first installment, with promissory notes, secured by mortgage on the premises, for the deferred payments within the time limited by the option of the purchase. *Held*, That the option of purchase was assignable to third parties, with right of action *eo nomine*, that the assignee had substantially complied with the conditions of the option and was entitled to the specific performance of the contract.

2. The evidence examined, and found not to sustain the judgment below.

APPEAL from the district court for Buffalo county.
Heard below before HAMER, J.

Marston & Nevius, and *T. M. Stuart*, for appellant, cited, contending that mutuality was not required in unilateral contracts: *Pomeroy*, Spec. Perf., sec. 169, and notes; *Moses v. M'Clain*, 2 S. Rep. [Ala.], 742, 744; *Hall v. Center*, 40 Cal., 67; *R. Co. v. Flanagan*, 3 Am. St. Rep. [Ind.], 675; *Crawford v. Payne*, 19 Ia., 172. All contracts, save those for personal or professional services, are assignable: *Wagner v. Cheney*, 16 Neb., 202; 2 Story, Eq. Jur., sec. 1040; *Pierce v. Robinson*, 13 Cal., 117; *Pomeroy*, Spec. Perf., sec. 487.

Calkins & Pratt, contra, cited cases referred to in opinion.

COBB, CH. J.

This action was brought April 27, 1888, to enforce the specific performance of the following contract :

"Articles of agreement made this eighteenth day of July, 1887, by and between Miss E. C. Gibbs, of Buffalo county, Nebraska, of the first part, and F. A. Archibald, of Hamilton county, Ohio, of the second part, witnesseth, that the said party of the first part, in consideration of the sum of \$5.00 (five) in hand paid, the receipt whereof is hereby acknowledged, hereby covenants and agrees to sell and convey to the party of the second part at any time within five months, on being thereunto requested in writing, the premises hereinafter described on the terms and conditions hereinafter mentioned. On the failure of the party of the second part to notify the party of the first part within the time above specified of his intention to take the property on the terms and conditions hereinafter specified, then this contract shall be conclusively forfeited and determined, and the party of the second part shall forfeit the payment above made by him, which shall be retained by the party of the first part in full satisfaction of all damages by him sustained by reason hereof; if the party of the second part shall declare his option to take said property in the manner and within the time aforesaid, then the said party of the first part hereby covenants and agrees that he will convey and assure to the party of the second part, in fee simple, clear of all incumbrances whatsoever, by good and sufficient warranty deed, the following lot, piece, or parcel of ground, viz: South half lot 110, Wyoming ave., Kearney, embracing 25 feet front, 130 deep, and the second party of the second part covenants and agrees to pay the said party of the first part, if he shall declare his option to take said

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property, the further sum of \$3,500, payable as follows: Fifteen hundred dollars, cash, upon execution of deed, one thousand in one year and one thousand in two years (from date of deed) with interest at 10 per cent on deferred payments. It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties hereto.

"In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

MISS E. C. GIBBS. [L. s.]

"F. A. ARCHIBALD. [L. s.]"

Second—That on October 14, 1887, Archibald, without having declared his option to take the property, assigned the contract to the appellant for the sum of \$175.

Third—That on December 17, 1887, George W. Frank addressed a letter to the appellee as follows:

"Madam—Referring to your conversation with Mr. C. H. Elmendorf a few days since as to an extension of an option to purchase the south one-half of lot one hundred and ten on Wyoming avenue, in the city of Kearney, Nebraska, embracing twenty-five foot front and rear by one hundred and thirty feet deep, dated July 18, 1887, signed by yourself and F. A. Archibald and acknowledged before Syl. S. St. John on the same day, I would say: Mr. C. H. Elmendorf and myself have been to your place of residence on the above described property, also to the store of Messrs. Grant & Hartzell, as well as the Kearney National Bank, of Kearney, Nebraska, taking with us fifteen hundred dollars to pay the amount which would become due upon the execution of the deed by yourself for the above described property, also two notes, one dated December 17, 1887, for one thousand dollars and due at the Kearney National Bank (your banking house) on or before one year from date; one dated December 17, 1887, for one thousand

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dollars, due at the Kearney National Bank in the city of Kearney (your banking house) on or before two years from date; also a mortgage duly executed and signed on the 17th day of December, 1887, to secure the two notes above described. I also took one deed drawn for you to execute for the above described property, thus complying in full with the terms of the agreement referred to above between yourself and F. A. Archibald of the part of the assignee.

"I will mail one copy of this letter to your address at the Kearney postoffice and leave one copy of it at your place of residence.

GEO. W. FRANK,

"Agent for owner of contract above referred to."

"P. S.—All the above papers, including the money, you will find at the Kearney National Bank (your bankers), in the city of Kearney, Nebraska, to be delivered to you upon the execution of the deed by you above referred to."

Fourth—That Frank on the same day deposited his check for \$1,500, two notes, and a mortgage upon the property to secure the same, both executed by Will. J. Scoutt, together with a draft of a warranty deed for the premises from the appellee to Scoutt, with instructions to the bank to deliver the check, notes, and mortgage to the appellee upon the execution of the deed, which she failed to execute; that the appellant brought the money and securities into court, and offers the same to the appellee upon her fulfilling the terms of the contract; that since December 17, 1887, the premises have been leased to the present occupants, Theodore N. Hartzell and J. F. Wheelock, who are made defendants, and who have paid the appellee a monthly rent, the amount not known, which the appellant is entitled to receive since December 17, 1887.

The appellant asks that Gibbs be enjoined from conveying or incumbering the property, and that Hartzell and Wheelock be enjoined from paying further rents therefor. On April 27, 1888, injunction against defendants was granted as prayed in the plaintiff's petition.

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On May 20, 1888, the appellee answered, setting up, in substance, that she objected to the specific performance of the contract on the grounds:

"1. That the contract was obtained by fraud and undue influence while the defendant was sick, and feeble, and incompetent to contract.

"2. That the contract was not fair, just, or reasonable.

"3. That the letter signed George W. Frank, agent for the owner of contract, was not a sufficient 'request in writing' within the meaning of the contract.

"4. That the deposit of a check and notes of Mr. Scoutt, in the bank, was not a sufficient offer or performance on the part of plaintiff.

"5. That the contract was one involving personal trust and was not assignable before acceptance."

The appellant replied, denying each allegation in the answer set up as a defense.

There was a trial to the court, without a jury, and the court held:

"1. That five dollars, the sum paid by Archibald to the defendant as a consideration of the option, was unfair and inequitable, and while the contract was not obtained by means of fraudulent representations, or by undue influence over a person of feeble mind, that it was nevertheless a bad bargain that a court of equity is not bound to enforce and should not enforce.

"2. The court further found that by the contract made the Archibald mentioned in the plaintiff's petition was to elect whether he should accept the property at the price named within five months and to so notify the defendant in writing; that he never did so elect to purchase the property, never did notify the defendant in writing of such election, and never did pay the defendant any part of the purchase price agreed upon, and has not complied with the terms of the contract made; that the notes offered were not the obligations of the said Archibald and that the defend-

ant was not bound to accept them. Judgment for the defendant dismissing petition. Costs taxed to plaintiff."

From the judgment and finding of the court the plaintiff appealed.

It is argued by counsel, as the predicate of the appellee, that to enforce the specific performance of the appellant's option of purchase, the contract as to her must be found to have been perfectly fair, equal and just in its terms and in its circumstances, which, it is contended, this contract was not and therefore should not be enforced. (Pom., Eq. Jur., sec. 1405.)

The court below found from the evidence that, "while the contract was not obtained by means of fraudulent representations, or by undue influence over a person of feeble mind, that it was, nevertheless, a bad bargain that a court of equity is not bound to enforce, and should not enforce." There is then no inquiry to be made as to the allegations of fraud and undue influence towards the sick, feeble, and incompetent appellee. The court below found otherwise, and we shall accept that fact as substantial. Her self-possession and capacity to manage her own pecuniary affairs appear in sharp contrast to the allegations of incompetency. However bad her bargain may have been deemed to be, we are not left, as to its quality and value, to mere speculation and conjecture. The parties, themselves, concluded the bargain after taking due time for reflection, and fixed the price of the property at \$3,500. Five witnesses for the appellant concurred in this estimate. One laid the value of it at \$3,750. Three witnesses for the appellee considered it worth from \$3,500 to \$4,000, and two others went as high as \$4,500. Another witness thought he would pay for it \$4,000, less the value of the improvements, and two witnesses valued the improvements at \$1,500. All of this evidence was from real estate dealers in Kearney, who had made no serious offer of purchase. The original second party to the contract received from the

appellant only an advance of \$175 on his option. It does not appear to have been of sufficient prospective value to have brought a higher price from any of the real estate dealers who testified as to its value. While real estate was then the subject of exchange in Kearney there was no contemporaneous sale of like property tending to prove this sale as a bad bargain which a court of equity should not enforce. But the evidence tends clearly to show that the appellee's bargain was not a bad one in the sense of being foolish, stupid, wasteful, or improvident on her part. If the property was, for any personal reason, endeared to her beyond its commercial value, that fact was to be considered by her alone, before voluntarily entering into a written contract for the sale of it. Nor does it appear that the price, \$3,500, was inadequate or unreasonable, or so far below any speculative appraisal of the property that the bargain for its sale was perverse to that degree that a court of equity should not enforce it. Under the contract, there was offered her ample security for the deferred payments, aside from a vendor's lien which was fully published by the acknowledgment and recording of the contract. That record was public notice that the vendor's lien attached for the deferred payments on the property and the accruing interest. While it is true that there was no provision for the notes and mortgage offered, yet, still, what other device, as security, could the appellee have claimed?

The appellee received, and still holds, the sum of \$5 for this option of purchase, as consideration for the contract. As to the question of adequacy, one dollar would have been a sufficient sum, if mutually agreed upon; while the nature of the transaction was such that no money need to have been passed to render the contract legal and binding upon the parties. The requisite consideration to the vendor was the agreement to purchase at a time certain, and pay the price agreed upon. It created that benefit to her advantage, sufficient to support the contract.

It was held in *Blake's Case*, 7 Ia., 46, that "Each party to a contract may ordinarily exercise his own discretion as to the adequacy of the consideration; and if the agreement be made *bona fide* it matters not how insignificant the benefit may apparently be to the promisor, or slight the inconvenience or damage to the promisee, provided it be susceptible of legal estimation. Where the inadequacy of consideration is so gross as to create a presumption of fraud, the contract thereon will not be enforced; but it is the *fraud* involved, and not the inadequacy of the consideration, which tends to invalidate the contract."

We have found no fraud in the present transaction. The rule cited is, therefore, applicable in this instance, and is supported by recognized authority. Bishop lays it down as to contracts, and therein, sec. 45, that "Where an exact sum of money is given or to be given by the one party in return for something not money by the other, or where the thing on neither side is money, a court of law, and commonly a court of equity, will not interfere with their estimates of value, but will hold the contract good though the judge or jury should deem the value to be greatly more or less than the parties did. Yet inadequacy of value may be strong evidence of fraud, should that question be raised, or it may suggest fraud; and in a gross case it may be the controlling circumstance in establishing the fraud. So, on an appeal to the discretion of the court in a bill for specific performance, this relief will be withheld, not simply where the price is greater or less than the court would deem adequate, but where it is so much greater or less as to render the bargain unconscionable or its enforcement unjust. Upon which question there are some distinctions, and perhaps differences of judicial opinion,"—adds the commentator.

We have already seen that neither alternative, inadequate price, nor unconscionable bargain was established in this case. Such distinctions and differences of judicial opin-

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ion as may have been held, limiting the remedy for those reasons, are not deemed of importance to reconcile here.

The question remains, and upon which depends the right of the appellant to maintain his action, Was the contract assignable? It is contended by counsel for the appellee that it was only assignable by the original party to it first accepting the option and becoming personally responsible to the vendor for the purchase money; that it was a contract involving a personal trust, and a degree of confidence which could not be subrogated to another. In support of this view is cited the decision in *Newton's Case*, 11 R. I., 390: "The defendant made his bond to J. S., conditioned that he might at his own option, within seven years, purchase certain real estate of defendant upon paying \$800. J. S. dying three years before the expiration of the option, without having availed himself of it, it was held, that the option was neither a chose in action nor a transmissible right, but a personal privilege which lapsed upon the death of J. S., the sole beneficiary." The court said: "The privilege did not in express terms extend to the heirs or legal representatives of J. S., who brought the action, and, therefore, if it is passed to them, it was either as a chose in action, or a transmissible right of property, which it was not, for the want of election under the option, by the death of one of the parties, which freed both of the obligations of the contract." These facts defeat all the supposed analogy of the precedent with the present case. Here there is an expressed provision "that all the covenants and agreements shall extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties;" in the precedent it is wanting.

The second case cited by counsel, *The Arkansas Valley Smelting Co. v. Belding Mining Co.*, 8 Sup. Court Reporter [Col.], 1308, was brought on a contract of the defendant to deliver 10,000 tons of carbonate lead ore to Billing & Eilers, assigned to the plaintiff, with certain conditions

that the assignors, as mining experts and ore reducers, were obliged to execute. The court held that the contract was personal in its nature, and that the plaintiff, as assignee, could not compel the delivery of the ore. This example bears no relation to the present controversy, and is without significance as an argument in the case.

On the other hand, it is contended that courts of equity ought to take notice of the assignments of property and enforce the equitable rights of parties to just transactions in cases where assignments are not recognized at law as effectual to convey title. Authority is cited, "That courts of equity have long since totally disregarded this nicety, and accordingly give effect to assignments of trust and possibilities of trusts and contingent interests and expectancies, whether they are in real or personal estate, as well as to assignments of choses in action. Every such assignment is considered, in equity, as in its nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or reduce the property into possession." (Story, Eq. Juris., sec. 1040.)

A later author has said: "Unless the contract calls for personal services, or which depend upon the learning, skill, solvency, or other personal quality of the party, or is fiduciary in its nature, it may be assigned by the vendee or the party in analogous position. This class of assignable agreements includes all ordinary contracts for the sale or leasing of land or personal property. The assignee may then sue in his own name to compel the specific performance of the contract." (Pomeroy, Spec. Perf. of Contracts, sec. 487.)

It is admitted that, under the rule of this authority, an advocate, a surgeon, a chemist, an architect, a farrier, a mineralogist, or a technologist could not substitute personal services, under contract, by assignment; but it is equally clear that the rule does not exclude the contracts of

brokers and dealers in real estate. The authority cited has long been in the library of courts, and not without use and sanction.

In *Wagner v. Cheney*, 16 Neb., 202, it was held "That a condition in a contract for the sale of real estate requiring the assent of the vendor to the assignment of the same, but not providing for a penalty or forfeiture of the contract, will not defeat an action for specific performance by an assignee who has fully performed." The plaintiff was the second assignee, and third in possession, and the terms of the contract had been kept whole by each. The defendant admitted the premises, but set up that the contract provided that no assignment of the premises should be valid without his written consent indorsed on the contract, which had not been given. Judge MAXWELL, in the opinion, said: "Where a penalty or forfeiture is assigned as a security to enforce the principal obligation, it has performed its purpose when the party insisting upon the penalty is fully paid his money or damages. The defendant has been paid according to the terms of the contract. While receiving the plaintiff's money for the land, thus admitting the validity of the contract, he objects, for the reason that he has not given his assent to the plaintiff's assignment. He has the notes of the original purchaser; the plaintiff offers to secure them by mortgage on the land. This is sufficient, and the answer constitutes no defense to the action."

The conditions and reasoning thus presented are not so remote in analogy from the case at bar that the same rule should not be applied, that the assignee, having complied with the terms of the contract, takes all the rights of the purchaser. And how has he complied with the contract? By notice in writing of his acceptance of its terms; by a tender of the cash payment due; by an offer of promissory notes for the amounts of the deferred payments, made secure by a mortgage on the premises. These acts, supplemental to those of the purchaser, are consubstantial with all the

elements of a contract for the purchase of real property to be enforced as a right. We hold that he had thus completed what, in law, was required to be done to be subrogated to the purchaser's rights. This view is found to be in accordance with various precedents under doctrine recognized in English courts from a remote period.

In *Crosbie v. Tooke*, 7 Eng. Ch. Rep., 431, it was held that "It is no defense to a bill, filed against a landlord for specific performance of an agreement for a farming lease, by one to whom the benefit of the agreement had been assigned, that the party with whom the landlord had contracted, one Bickmore, had become insolvent, provided the assignee was solvent, and in condition to enter into the usual covenants, and there is no evidence that the contract was entered into upon considerations personal to the assignor." Injunction resting against the defendant's action of ejectment to oust the plaintiff, the vice chancellor, on hearing, was of the opinion that the defendant was released from his contract by the insolvency of Bickmore before any lease had been executed to him, and therefore dissolved the injunction. On a motion for appeal by plaintiff, and that the vice chancellor's order might be discharged, and the injunction revived, it was contended by the solicitor general that the subsequent insolvency of the original lessee was no valid reason why the defendant should not be compelled to the specific performance of his contract for the benefit of the plaintiff, whose solvency was not disputed, and who claimed by a title derived from that lessee. If a lease had been executed to him, it must have been in the common form, without a covenant against alienation, as no such stipulation was found in the agreement. As the lease to be granted would have been assignable, the contract itself must be equally so. If the lease had been immediately executed the defendant would have had the covenant of an insolvent for rent, which would have been worthless, but would now have, in the plaintiff, a responsible and solvent

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tenant, and would stand in a better situation than if the lease had been made to the original contractor. Sir Edward Sugden, *contra*, insisted, that, as the defendant's agreement with Bickmore contained no authority to assign, it was of a purely personal character; and so long as matters rested in *fieri*, yet to be settled, that character continued. Bickmore, it was admitted, was not in condition to call for specific performance, inasmuch as his insolvency had disabled him from executing his part of the agreement, and the plaintiff, who claimed by assignment from him, could have no better equity than his assignor. There was no mutuality between these parties. If the plaintiff, notwithstanding Bickmore's assignment, had chosen to repudiate the contract, the defendant could never have compelled him to complete it; nor could the execution of a lease, in which were inserted the usual covenants by the plaintiff for payment of the rent be, with any propriety of speech, described as a specific performance of the defendant's original contract with Bickmore, which the present bill pretended to enforce. The insolvency of Bickmore, therefore, must be considered, as the vice chancellor had considered it, to operate as determining the agreement altogether. The lord chancellor Brougham held, that there was nothing in the dealing of the parties to the instrument itself to justify the contention that this was a contract made by the landlord specially and personally with Bickmore; that he had been unable to discover anything which should differ the interest here contracted to be given from that under which any tenant would have under a common farming lease. The case is therefore left to rest upon the ground upon which it was decided in the court below; and I am clearly of the opinion that the circumstances of the party who originally contracted having assigned his interest cannot be taken into consideration, the assignee being admitted to be a person in solvent circumstances, and able to enter into the covenants of the proposed lease, and that the insolvency of the as-

signor cannot be set up with effect for the purpose of releasing the defendant from the specific performance of his agreement. The vice chancellor's order was discharged, and the injunction was revived. Afterwards, upon a hearing at the rolls, the defendant abandoned the objection upon the ground of the original tenant's insolvency, and a decree was made according to the prayer of the bill.

In *Morgan v. Rhodes*, Id., 435, Lord Brougham again held, "Where a landlord agrees to grant a lease to A, his executors, administrators, and assigns, on certain conditions, and A assigns his interest in the contract to B, and becomes bankrupt, B on performing the conditions has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy; and this right is not affected by a proviso that in case of the bankruptcy of A the landlord shall have power to re-enter and sell the benefit of the contract and the premises, and hold the proceeds, subject to his own claims, for the use of A's estate."

In *Maughlin v. Perry*, 35 Md., 352, W., on March 9, 1864, rented certain premises, of which he was owner, to H. for three years, renewable for like period, agreeing for himself, his heirs and assigns, to sell and convey the premises to H., his heirs and assigns, for \$1,500 at any time before the expiration of the lease. It was further agreed that W. should give H. at least three months' notice in writing, before the expiration of the lease, of his intention not to renew, and in default of such notice, the lease was to continue for another term of three years, as also the privilege to purchase the property. On March 15, 1867, W. contracted to sell the property to M. for \$1,600, payable in installments, which were paid as they became due. W. died intestate before the termination of the lease, which by its provisions had become renewed for three years. The rights of H. by *mesne* assignments became vested in the appellees. On a bill filed March 3, 1870, six days before the expiration of the lease, by the

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appellees against the appellant, and the administrator of W., alleging that the complainants were ready to pay the stipulated sum, and desired to have a conveyance of the property, and asking for the specific performance of the agreement, it was held that the filing of the bill, and offer to pay the price stipulated, was such a substantial compliance on the part of the assignees of H. with the terms of the covenant as to entitle them to have it specifically executed.

In *Owen v. Frink*, 24 Cal., 171, it was held that if A contracts with B for the conveyance of a tract of land whereby B has the right of conveyance of an entire tract, and afterwards assigns to two or more persons, giving to each a separate conveyance of his equitable title to separate parcels of the land, the assignees of B may maintain a joint action against A for a specific performance of the contract. It was also held that a contract for the conveyance of land, to be paid for either in labor or money at the purchaser's option, may be enforced in equity if the purchaser elects to pay in money and makes a tender of the amount due.

In *Gaston v. Plum et al.*, 14 Conn., 343: A, being the owner of land supposed to contain minerals, on January 21, 1839, by a written instrument granted liberty to B to dig or mine said land, and carry away any mineral discovered, within one year; and B on May 11, 1839, by writings signed by him, on the back of the instrument, assigned to C all his interest, right, and privilege in the land therein mentioned, with the appurtenances, and all benefit and advantage derivable from such instrument; upon which B brought a bill in chancery against A and others for a specific performance of the agreement. It was held, first, that the agreement was not of a fiduciary character, or in the nature of a personal confidence, so as to be incapable of assignment; nor, second, was the interest of B of that uncertain and contingent description that it could

not on that account be transferred; and consequently B having parted with all his interest in the subject of the bill, it was, for that reason, dismissed.

In *Fitzhugh et al. v. Smith*, 62 Ill., 486, "Where the complainants in a bill for specific performance succeeded to the rights of the original vendee, by purchase of his interest in real estate at a judicial sale, and the vendee's contract of purchase had not been recorded so as to give notice of its terms, held, that it was not necessary for the complainants, before filing their bill, to make a formal tender of the precise sum due the vendor; that it was sufficient to offer to perform the contract when the vendor declines to recognize their right to a deed unless they pay him the money which he had loaned the vendee."

In *Perkins v. Hadsell*, 50 Ill., 216, it was held, if the owner of lands gives to another the option to select and purchase a lot at a stipulated price, on certain conditions that he shall make the selection within a given time, pay the taxes, improve the lot and pay the purchase money, upon the performance of which the owner agrees to convey, while he may, no doubt, at any time before his proposition is accepted by the other party selecting, entering upon, and commencing to improve the land, withdraw his offer, yet, after the other party has accepted the proposition, by doing all that he was required to do by its terms, it is then too late for the owner to recede, and he may be compelled, on a bill for specific performance, to convey the land. And in this case, the mutuality and the consideration for the agreement to convey, consist in the party having the option having actually done, upon the promise of the owner, what he required to have done, and it is immaterial that it was done without having entered into a previous undertaking to do it.

In *Corbus et al. v. Teed*, 69 Ill., 205, where the purchaser of land assigned his contract for a deed before payment, and the assignee neglected to make the payments,

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held, that a tender of conveyance, preliminary to a bill for specific performance by the vendor, was properly made to the original purchaser; held, also, that the assignee of purchaser will have the right or option of completing the contract, and thereupon to insist upon a conveyance to himself.

In *House v. Dexter et al.*, 9 Mich., 246, it was held that "the heir at law of the vendee, and not the administrator, is the proper party complainant to a bill to compel the specific performance by the vendor of a contract for the conveyance of lands."

In *Miller v. Whittier et al.*, 32 Me., 203, it was held that "one, bound to convey land upon the performance by another of certain conditions, does, by purposely incapacitating himself to make the conveyance, exonerate the obligee from the performance of his conditions, prior to exhibiting a bill for special performance of contract." Held, also, "that one who has assigned all his interest in a contract made to him, need not join with the assignee as a plaintiff in a bill for performance."

In *Currier v. Howard*, 14 Gray, 511, it was held that a contract in writing to convey land may be assigned by verbal agreement, and under the Massachusetts Statutes of 1853, C. 271, the assignee might enforce specific performance in his own name, in an action at law praying equitable relief.

Whether or not the minor distinctions to be found in the examples cited differ materially from the minor conditions of the present case, the rule is broadly maintained from Maine to California, that option contracts for the purchase of real estate are, in law, assignable to third parties, who may enforce the terms by action in their own name. This established, we hold that the court below erred in finding the consideration of the option unfair and inequitable, and that the contract of the appellee was a bad bargain, not to be enforced in a court of equity.

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Adversely to this judgment, we have found that the notice in writing to the appellee, and the election of purchase by the appellant, were timely and sufficient; that the tender of cash payment and the offer of the promissory notes, secured by mortgage, for the deferred payments were ample security, and was such a compliance with the contract as entitled the appellant to an immediate and full conveyance of the title to the premises.

The judgment of the district court is reversed and judgment for the specific performance of the contract in accordance with the prayer of the plaintiff's petition, and upon the terms and conditions therein, will be entered in this court.

JUDGMENT ACCORDINGLY.

THE other judges concur.

NICHOLAS WULLENWABER ET AL., APPELLES, V. MICHAEL DUNIGAN ET AL., APPELLANTS.

[FILED NOVEMBER 25, 1891.]

1. See syllabus of the original opinion.
2. **Res Gestæ: FALSE REPRESENTATIONS: SIGNERS TO PETITION FOR RAILROAD BOND: ELECTION INDUCED BY.** Where, in the course of the canvassing and electioneering to induce a sufficient number of freeholders of a certain town to become signers of a petition to the county board for an election for the issuance of bonds to be donated to a railroad company, certain representations, promises, and inducements were falsely and fraudulently made and held out by the railroad company to such freeholders, and which resulted in such freeholders becoming signers to said petition, *held*, that such representations, promises, and inducements, although made at a time and meeting previous to the time at which said freeholders became signers, were nevertheless a part of the *res gestæ*.

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3. ———: ———: ———: AGENTS. Where two agents of a railroad company were engaged in the common purpose of soliciting the freeholders of a town to become signers to a petition for the calling of an election to vote bonds, and one of said agents made certain pledges and promises, and held out certain inducements to said freeholders who shortly afterwards were by the other of the said agents presented with said petition, and signed the same, *held*, that such pledges, promises, and inducements were a part of the *res gestæ*.

REHEARING of case reported 30 Neb., 877.

George W. Post, and *D. C. McKillip*, for appellants.

Norval Bros. & Lowley, *contra*.

COBB, CH. J.

This cause was brought to this court on appeal from the district court of Seward county, was argued and submitted at a former term, the judgment of the district court affirmed and opinion filed, which is published in the 30th volume of our reports, p. 877. At the last term a reargument was granted upon the application of the defendant, the Fremont, Elkhorn & Missouri Valley Railroad Company. The cause was again argued and submitted at the present term.

The object of the action was to restrain and enjoin the issuing and delivering of \$10,000 of the bonds of "K" town, in the county of Seward, claimed to have been voted by said town, as a donation to the railroad company, at a special election held in said town, for that purpose, on the 25th day of February, 1887. The grounds of said action were:

First—Fraudulent representations, promises, and inducements made by the defendant railroad company, its agents and aid solicitors, to induce sixteen of the petitioners who signed the petition asking the board of supervisors to call the special election submitting said question to the voters of said town, whereby they were induced to sign said peti-

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tion, and without the signatures thus fraudulently obtained there were less than fifty legal freehold petitioners upon said petition.

Second—That nine of the signers, whose names appear on said petition, were not freeholders of said town, and that one of the names signed to said petition, to-wit, John Draper, was that of an insane man, incompetent to transact any business, and that he did not sign the same nor authorize any person to sign it for him.

Third—Fraudulent representations and promises made by the agents, officers, employes, and aid-agents of the defendant railroad company, to voters of said "K" town to vote the said bonds.

Upon the trial, the finding of the court, although quite full, was general, and was equally applicable to either of the three grounds covered by the plaintiff's petition.

The opinion of this court hereinbefore referred to is confined to the first proposition stated.

The statute makes it a condition precedent to the submission of a proposition to vote bonds to be donated to a work of internal improvement, that a petition be presented praying for such submission, signed by not less than fifty freeholders of the town, or other municipality, by which the donation is to be made. It appears by the record that fifty-six petitioners signed the petition which was presented to the county board of Seward county, praying the submission of the proposition to vote bonds to the voters of town "K," in said county. The petition upon which the cause was tried alleges that more than sixteen of the petitioners on said petition were induced and prevailed upon to sign and did sign, said petition solely and wholly upon the promises, representations, and agreements of the defendant Fremont, Elkhorn & Missouri Valley Railroad Company, through and by its officers, agents, attorneys, and employes and aid solicitors, that in the event of the submitting of said propositions to and the voting by said town "K" of

the bonds contemplated, said company would immediately, upon the completion of its said road through said town, establish and locate a permanent freight and passenger depot on its said proposed line of road within one-half mile of the center of said town and upon section 16 therein; with other averments to the effect that by virtue of the said petition a special election was called in said town "K"; that at said election the said contemplated bonds were voted; that the said railroad had been constructed through the said town, but that the said defendant company has failed and refused to locate and erect such depot, at or near the center of said town, or upon said section 16.

As stated in the original opinion, there is a large amount of evidence tending to prove that seven of the persons who signed the said petition were induced to do so solely by the promise of persons representing said railroad company, that the depot in said town "K" would be located at the point named in the petition in this action. This general proposition is scarcely denied or contested by counsel in the brief on the reargument; but they contend that the persons making these promises and inducements were not authorized to bind the railroad company thereby, and that such promises and agreements were not made at such times as to become and be a part of the *res gestæ* of the signing of said petition by the said several petitioners.

There was evidence before the district court, from which it could have found, and doubtless did find, that four of the signers to the petition, to-wit, Wullenwaber, Sorter, Hudson, and Barthold, were induced to sign the same by promises as to the location of the said depot, made directly to them severally by I. F. Goehner; that one of said signers, to-wit, Fetten, was induced to sign the said petition by promises in relation to the location of said depot made to him by said I. F. Goehner indirectly through his competitor Wullenwaber; that one of said signers, to-wit, Spahr, was induced to sign said petition by promises in

relation to the location of said depot, made to him by the said I. F. Goehner, indirectly through his co-petitioners Wullenwaben, Sorter, and Hudson; and that one of said signers, to-wit, Rogge, was induced to sign said petition by promises made to him by the said I. F. Goehner indirectly through his co-petitioner Hudson.

It is not contended that the said I. F. Goehner had direct authority from the board of directors of the defendant railroad company to make the said promises, or any promises, to the said signers or any of them to induce them to sign the said petition, but it is contended, and is believed, that the evidence sufficiently proves that he was authorized by the last-named defendant, indirectly, through P. E. Hall, the superintendent of construction of the defendant railroad company, to procure the signatures of a sufficient number of the freeholders of the said town "K" to the petition for said election for voting bonds and to do the necessary soliciting and electioneering for the accomplishing of that purpose. Also that the petition calling for said election, and which was afterward signed by the freeholders of said town "K," as hereinbefore stated, presented to the county board of Seward county, and upon which said election was in fact called, was, by the attorney of said company, who, in concert with the said superintendent of construction was actively engaged in behalf of said railroad company in soliciting and procuring the donation of bonds to said company by the several towns upon the line of its road in Seward county, and especially of town "K," prepared and placed in the hands of said I. F. Goehner, with authority and instructions that he, solely or in connection with W. Q. Dickinson, procure the signatures of the freeholders of said town "K" thereto, and take and use all of the necessary, proper, and expedient steps and measures for that purpose. And this, it is believed, conferred sufficient authority upon the said I. F. Goehner to bind the said defendant railroad company, by a promise to the signers of the

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petition, or those who would afterward, in consideration thereof, become signers, that a depot of said road should be located at a designated point. It follows, I think, that Mr. Goehner, having authority as above stated, and the object to be accomplished being one of taxation of private property, yet nevertheless was a public township concern in which one individual voter could alone accomplish but little, his authority was sufficient to operate through and by the aid of his associates, who were his neighbors, and but lately his fellow emigrants from a foreign country. The promises, therefore, of Goehner made to Fetten, Spahr, and Rogge, through Wullenwaber, Sorter, and Hudson, were the promises of the defendant railroad company made indirectly by the superintendent of construction and attorney. I might add that it appears from the evidence that many of the signers of the petition for the election were present at a public meeting and heard the attorney of the railroad company, in a public speech, made within the general scope and plan of the company's solicitation of donations from the several towns of Seward county, and especially town "K," promise on the part of the railroad company that the said company would locate and build a freight and passenger depot within a half mile from the center of section 16, in said "K" town, in Seward county.

The appellant railroad company contends, in the brief, on rehearing, that the statements and promises made to the petitioners, either directly or indirectly by or through Goehner, are no part of the *res gestæ*. In the limited time at my disposal I have been unable to find any case where the declaration of an agent has been held to be not of the *res gestæ*, because made before the final consummation of a contract. And I concede that in most of the cases the test has been whether the declaration was made at the time or so soon after the transaction or event as to forbid the conclusion that it was made as the result of study or reflection,

and in view of its effect as evidence. I cannot conceive that a declaration made in the course and progress of a negotiation and for the purpose of effecting the consummation of an agreement, is any the less a part of the *res gestæ* because of its being made at a previous interview shortly before the one at which such declaration or inducement resulted in the consummation of the contract.

It is also contended that because the petition was kept in the store of Mr. Goehner and presented to the signers by Mr. Dickinson, the promises and inducements made and held out by Dickinson to procure signers to that paper, cannot be considered a part of the *res gestæ*, although Dickinson and Goehner were engaged in the common work of soliciting petitioners and voters for the common purpose of obtaining the coveted donation by "K" town to the railroad company. I cannot agree to this proposition.

It is not deemed necessary to add to what is said in the original opinion as to the ratification and adoption on the part of the railroad company of the means used by the persons acting as its agents, procurers, and promoters, further than to say that a careful examination of the opinion fails to cast a doubt upon it as a correct exposition of the law in that respect.

I conclude, therefore, that there is sufficient evidence in the bill of exceptions to sustain the finding of the trial court that seven of the fifty-six signers of the petition, upon which the election for the bonds was called in "K" town, were induced to become such signers by means of the false, and in law fraudulent, representations of the defendant railroad company in respect to the location and erection of the railroad depot in the town of "K." This number of signers being eliminated from the petition leaves but forty-nine signers, less than the number required by statute to authorize the calling of such election.

There is another branch of the case which, though not treated in the original opinion, is worthy of some notice.

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It appears from the evidence that six of the signers of the petition, upon and by virtue of which the election for the issuance and donation of the railroad bonds in town "K" of Seward county was called and held, to-wit, Suddith, Muir, Miner, Pederson, Schultz, and Ebberpacher, were not, nor were either of them, freeholders of said "K" town at the time or date of the signing of said petition and the calling of said election, and that one of the signers of said petition, to-wit, Draper, was, at the time and date of the placing of his name to the said petition, insane and legally an inmate of the state hospital for the insane, to which he had been legally committed and from which he had never been discharged, but was at the time in fact discharged. Moreover, that he did not sign the said petition, but that his name was without authority written thereon by a Mr. Atwater. Thus it appears, and was evidently so found by the trial court, that there were not to exceed forty-two legal signers to the said petition. The judgment of the district court is again

AFFIRMED.

MAXWELL, J., concurs.

NORVAL, J., did not sit.

JOHN CRAIG V. HENRY E. WEITNER.

[FILED NOVEMBER 25, 1891.]

Contract: WORK AND LABOR: PERFORMANCE. In an action upon a contract to exterminate the prairie dogs upon a certain tract of land, *held*, that there had been a substantial compliance with the terms of the contract and that the plaintiff was entitled to recover.

ERROR to the district court for Colfax county. Tried below before POST, J.

Phelps & Sabin, for plaintiff in error.

Geo. H. Thomas, *contra*.

MAXWELL, J.

The defendant in error brought an action in the district court of Colfax county against the plaintiff in error upon a cause of action set forth in the petition as follows :

"That on or about the 27th day of April, 1887, the plaintiff and the defendant entered into an oral agreement and contract, whereby it was contracted and agreed by and between said plaintiff and defendant that said plaintiff should undertake the task and work of killing, exterminating, destroying, and banishing from a certain tract of land in Colfax precinct, Colfax county, Nebraska, owned by defendant, a certain lot of prairie dogs which then infested said land, and destroy and break up the so-called "dog town" then being on said land, and the said defendant, in consideration of the performance of said labor aforesaid, agreed to pay to said plaintiff the sum of \$125.

"Second—Soon after the making of said agreement, to-wit, on or about May 1, 1887, said plaintiff entered upon the performance of said contract on his part, and so continued the work until he had killed, exterminated, destroyed, and banished said prairie dogs from said land and broke up and destroyed said dog town, and said plaintiff had fully and entirely kept and performed all the conditions of said contract on his part to be kept and performed prior to June 1, 1888, and before the commencement of this action.

"Third—At or about the time of the commencement of said work by plaintiff, to-wit, on or about May 1, 1887, the said defendant paid to said plaintiff on the said contract the sum of \$25, and thereafter, to-wit, on or about the — day of —, 188—, said defendant paid to said

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plaintiff on said contract the further sum of \$50, but said defendant, though often requested so to do, has wholly failed, neglected, and refused to pay to said plaintiff the balance due to him on said contract, the sum of \$50, and there now remains due and unpaid on said contract from said defendant to said plaintiff the sum of \$50, with interest thereon from the 1st day of June, 1888.

"Wherefore plaintiff demands judgment against the defendant for the sum of \$50, with interest thereon from June 1, 1888, and costs of suit."

To this petition the defendant below answered as follows:

"And now comes the defendant, and for answer to the petition of the plaintiff filed in the above entitled cause, denies that the plaintiff has fully kept and performed all the conditions in said contract on his part to be kept and performed.

"The defendant denies that the plaintiff has ever killed, exterminated, destroyed, and banished said prairie dogs from the land of defendant and broke up and destroyed said 'dog town,' but the defendant alleges that the plaintiff has entirely and wholly failed and neglected to kill and exterminate said prairie dogs and destroy said 'dog town,' and to keep and perform his part of said contract, and has not earned the consideration therein for said contract from this defendant, and defendant denies that he is indebted to plaintiff in any sum whatever."

On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of \$50, upon which judgment was rendered.

The case is submitted on the question of the sufficiency of the evidence to sustain the verdict.

The testimony on the part of the defendant in error tends to show that there were many prairie dogs on the lands of the plaintiff in error, estimated at 7,000 when he took the contract to exterminate them. All the testi-

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mony tends to show that he has substantially performed his contract. It is unnecessary to review the evidence at length. The verdict and judgment are right and are

AFFIRMED.

THE other judges concur.

W. E. BAUER, APPELLEE, V. D. M. DEANE ET AL.,
APPELLANTS.

33	487
37	558

[FILED NOVEMBER 25, 1891.]

1. **Attachment: LIENS: PRIORITY.** The bank of V., located at V., in Saunders county, received \$1,785 from D., and issued to him a certificate of deposit signed by S., the president. Afterwards the bank stopped payment, when D. began an action against the bank in Butler county, and caused an attachment to be levied on certain personal property of S. On the next day one B. began an action by attachment against S. in Saunders county, and the same was levied on the property previously levied upon in favor of D. *Held*, That the attachment of B. constituted the first lien on the property.
2. —: **GROUND: PLEADING.** In this state an action is begun in the district court by filing a petition and issuing a summons thereon which is served on the defendant, and an attachment is ancillary thereto. Where, therefore, the petition makes no claim of liability against a defendant, stating no fact from which such liability may be inferred, there is no ground of attachment against him.
3. —: **PRIORITY: AN AMENDED PETITION** afterwards filed, which alleges a liability of the defendant to the plaintiff, will not take precedence of liens of other creditors which have attached since filing the original petition.

APPEAL from the district court for Butler county
Heard below before MARSHALL, J.

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Clark & Allen, for appellants:

As the pleadings fail to show the filing of an affidavit, there was no valid attachment lien. (*Dakin v. Hudson*, 6 Cow. [N. Y.], 221; *Frery v. Dakin*, 7 Johns. [N. Y.], 75; *Morgan v. Dyer*, 10 Id., 161; *Wyman v. Mitchell*, 1 Cow. [N. Y.], 316; *Otis v. Hitchcock*, 6 Wend. [N. Y.], 433; *Stephens v. Ely*, 6 Hill. [N. Y.], 607; *Ford v. Babcock*, 1 Denio [N. Y.], 158; *Hall v. Howe*, 10 Conn., 519; *Firebaugh v. Hall*, 63 Ill., 81.) It was necessary for the plaintiff that his attachment was valid in every particular. (*Thornburgh v. Hand*, 7 Cal., 554; *Williams v. Eickenberry*, 22 Neb., 211; *Oberfelder v. Kavanaugh*, 21 Id., 483-491.) As to the amended petition: *Abbott v. Pearson*, 130 Mass., 191; *Thompson*, Trials, sec. 834; *Connelly v. Edgerton*, 22 Neb., 83.

Geo. P. Sheesly, *contra*, cited, as to the amended petition: *Waples*, Attachment, 70, 71, 73, 75, 77, 104, 185, 302, 409, sec. 219; *Patterson v. Gulnare*, 2 Dis. [O.], 505; *Whitney v. Brunette*, 15 Wis., 67; *Bell v. Hall*, 2 Duvall [Ky.], 288; *Crouch v. Crouch*, 9 Ia., 269. As to the priority of the attachment liens: *Seibert v. Switzer*, 35 O. St., 661; *Endel v. Leibrock*, 33 Id., 254; *Pope v. Ins. Co.*, 24 Id., 481; *Kerr v. Mount*, 28 N. Y., 659; *Kelly v. Countryman*, 15 Hun [N. Y.], 99; *Woodmansee v. Rodgers*, 58 How. Pr. [N. Y.], 98; *Walker v. Roberts*, 4 Rich. [S. Car.], 561; *Harding v. Harding*, 25 Vt., 487; *Baird v. Williams*, 19 Pick. [Mass.], 381; *Peters v. Conway*, 4 Bush [Ky.], 566. As to the agency of Mrs. Scoville: *Sawyer v. Cutting*, 23 Vt., 486, 490; *Cobbett v. Hudson*, 15 Q. B. [Eng.], 988, 989.

MAXWELL, J.

The plaintiff filed a petition in the district court of Butler county as follows:

"First—That the defendant Daniel M. Deane, on the

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21st day of November, 1888, commenced an action in the district court in and for Butler county, Nebraska, against the State Bank of Valparaiso, F. A. Scoville, and George A. Crafts, to recover the sum of \$1,785 and interest, alleged to be due to the said Daniel M. Deane on a certificate of deposit issued by said bank to him; and the said Daniel M. Deane, at the time of filing his petition in said action, caused an order of attachment to be issued against the said defendants from the district court of Butler county, Nebraska, and the said attachment was placed in the hands of the defendant Sumner Darnell, as sheriff of said county, who, by virtue of said attachment, levied upon and took into his possession certain property, consisting of a certain grain elevator, certain cribs, certain corn and cobs taken as aforesaid as the property of the defendant F. A. Scoville, and situate on the grounds of the Fremont, Elkhorn & Missouri Valley Railroad Company, at Dwight, Richardson township, Butler county, Nebraska.

"Second—On the 22d day of November, 1888, the plaintiff herein, W. E. Bauer, commenced an action in the district court of Saunders county, Nebraska, against the said Frank A. Scoville and another, for the purpose of recovering the sum of \$1,409 and accruing interest on a certain promissory note given by the defendants therein in favor of the plaintiff, and caused an order of attachment to issue against the defendants therein from the said district court of Saunders county, said attachment being directed to the sheriff of Butler county, Nebraska, by virtue of which said attachment the said sheriff levied upon and took into his possession the elevator, cribs, corn, and cobs above described, taken as the property of defendant Frank A. Scoville, for the plaintiff W. E. Bauer, on the said 22d day of November, 1888, and made due return of the said order of attachment; that on the 17th day of September, 1889, the said plaintiff recovered judgment against the defendant Frank A. Scoville and another, in this said action in the

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district court of Saunders county, Nebraska, for the full amount claimed therein, to-wit, the sum of \$1,432.75, and upon said judgment the district court of Saunders county ordered the sale of all property taken by virtue of the attachment in said action as above set forth for the satisfaction of said judgment.

"Third—That in the above-mentioned cause of Daniel M. Deane against Frank A. Scoville and others in the district court of Butler county no legal service of summons was had on the defendant Frank A. Scoville, on any of the said defendants therein, and that said court had no jurisdiction over the said defendants, for the reason that at the time of the beginning of said action none of the defendants were, nor are they now, residents of the said Butler county, and the defendant the State Bank of Valparaiso has at no time had a place of business in said Butler county, and that said court had no jurisdiction to issue the attachment in said cause; and for the further reason that the affidavit for said attachment as made, signed, and sworn to by one Wm. Bays, as agent for the said plaintiff, and filed on the 21st day of November, 1888, was not sufficient to authorize the issuance of the said order of attachment; that after the said affidavit was filed and the pretended order of attachment had been issued thereon, the attorneys for the said plaintiff, J. C. Robberts and J. W. McLoud, changed and mutilated the said affidavit for attachment, without leave or knowledge of the court, by interlining in the said affidavit the words 'and are now non-residents of the state of Nebraska,' and further the words 'and the property of the bank,' and the word 'and the creditors of the bank,' and further the words 'and the property of the bank,' in different places throughout the body of the said affidavit, in such manner as to wholly change and destroy the affidavit and the meaning and intent as it existed at the time the same was filed as aforesaid, and that said affidavit was not sworn to by the plaintiff or any agent or attorney of his after such altera-

ation and interlineation as above described; that the affidavit was so changed and mutilated as above described after the plaintiff herein had commenced his action against the said F. A. Scoville and another in the district court of Saunders county and the levying of his said attachment therein, fraudulently and with the intent unlawfully to deprive this plaintiff of his rights in said action and under his said attachment.

"Fourth—That on the 14th day of January, 1889, a pretended answer, purporting to be the answer of defendant Frank A. Scoville, in the said cause of Deane against the said Scoville and others, was filed, which said answer pretended to admit all the allegations of the petition of the plaintiff, and set up no allegation of defense whatever to the action of the said Deane, upon the filing of which the said district court of Butler county, considering the said answer as the appearance of the said Frank A. Scoville, and depending upon the admission contained in said answer, and upon said admissions alone, taking no further testimony in that behalf, rendered judgment against the said Frank A. Scoville in favor of the said plaintiff Daniel M. Deane, and upon said judgment ordered that the property therein attached be sold and the proceeds applied to the satisfaction of said judgment. The plaintiff herein alleges that the said pretended answer was not the answer of the defendant Frank A. Scoville, but was filed by one Flora E. Scoville, wife of the said Frank A. Scoville; that the said Flora E. Scoville was not the agent of the said Frank A. Scoville for the purpose of making an appearance and filing said answer for him, and had no authority whatever to answer, or in any way to appear for the said Frank A. Scoville in the said cause, and knew she had no such authority; that the said pretended answer was filed by the fraud and fraudulent representations of the said Flora E. Scoville to be the authorized agent of the said Frank A. Scoville; that the said pretended answer

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was indorsed by S. H. Steele & Bro., as the attorneys of the said Frank A. Scoville in said action; that the said pretended answer was procured to be filed by the fraud and fraudulent collusion of the said attorneys for the said plaintiff Daniel M. Deane, Robberts and McLoud and one Allen, of Valparaiso, Nebraska, and Flora E. Scoville, aforesaid, and the said Daniel M. Deane; that answer was written and prepared by the said Daniel M. Deane; that the said Allen, acting for the said Deane as aforesaid, presented the same to the said Flora E. Scoville and fraudulently procured her signature and verification thereto; that the said J. C. Robberts, fraudulently, and acting in collusion and connivance with the said Daniel M. Deane, Flora E. Scoville, and said Allen, procured the consent of the said S. H. Steele & Bro., upon the written request of the said Flora E. Scoville, to indorse the said pretended answer as attorneys for the said Frank A. Scoville; that the said S. H. Steele & Bro. were not the attorneys for the said Frank A. Scoville and had no authority whatever to appear for him in said cause, and only made such appearance by fraud, collusion, and connivance as aforesaid, for the purpose of defeating the plaintiff herein and depriving him of his rights under his said action and attachment; that upon the said 14th day of January, 1889, a pretended answer, purporting to be the answer of the defendant the State Bank of Valparaiso to the petition of the said Daniel M. Deane, the plaintiff therein, which said answer purported to admit all the allegations of the said petition, and set up no allegation of defense thereto; that the same was signed and verified by one H. E. Rice and indorsed by S. H. Steele & Bro. as attorneys for said State Bank of Valparaiso; that the said H. E. Rice had no authority or power to appear as aforesaid; that the said S. H. Steele & Bro. were not the attorneys for the defendant the State Bank of Valparaiso, but were procured to so indorse said answer by the fraud and collusion of said Robberts, Rice, and Deane;

that the said answer was filed by the fraud and fraudulent collusion of the said Daniel M. Deane, J. C. Robberts, and H. E. Rice, acting and conspiring together to defeat the plaintiff herein and deprive him of his rights under his action and attachment as aforesaid; that the said district court, relying on the admissions of said answer as the answer of the said State Bank of Valparaiso, and taking no further testimony whatever, rendered judgment against the defendant therein.

"Fifth—That an order of sale of the attached property, as hereinbefore set forth, has been issued from the district court of Butler county for the satisfaction of the judgment of the said Deane against the said Frank A. Scoville, so fraudulently procured as aforesaid, and that said order was placed into the hands of the defendant Sumner Darnell, as sheriff of Butler county, and was by him advertised to be sold on the 12th day of March, 1889; that the said property was sold by the said sheriff after the beginning of this action, and the proceeds of said sale are now in the hands of said sheriff as per stipulation of parties hereto and now on file in this cause.

"Sixth—By reason of the fraud and collusion of the above named persons as hereinbefore set forth, the plaintiff herein has been deprived of his rights under his said action and attachment.

"Wherefore the plaintiff prays that the said Daniel M. Deane be forever enjoined from executing said judgment, or proceeding upon said order of sale as against the rights of this plaintiff as hereinbefore set forth, and that the proceeds of the said stipulated sale be ordered to be paid by the said Sumner Darnell, as sheriff, into the district court of Saunders county, Nebraska, to be applied to the satisfaction of the judgment of this plaintiff therein as above set forth, and for such other and further relief as may be just and equitable."

To this petition the defendant Deane filed an answer as follows:

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"Comes now the defendant Daniel M. Deane, and answering the petition of the plaintiff, admits that he commenced an action in the district court of Butler county on the 21st day of November, 1888, against Frank A. Scoville, Geo. A. Crafts, and the State Bank of Valparaiso, to recover the sum of \$1,785; admits that he caused an order of attachment to be issued therein and levied on the said elevator on said day; admits that the plaintiff commenced an action against Frank A. Scoville in the district court of Saunders county on the 22d day of November, 1888, and caused an order of attachment issued therein to be levied on said elevator; admits that the answer of Frank A. Scoville to the action of the defendant herein was filed on the 14th day of January, 1889, and that said S. H. Steele appeared for him as his attorney; admits that said Flora E. Scoville verified such answer as his agent; admits that on said day the answer of the State Bank of Valparaiso was filed and that it was verified by H. E. Rice, and that said Steele appeared as the attorney for said bank; admits that said Darnell advertised and sold said elevator by an order of sale issued on this defendant's judgment.

"Second—And the defendant denies each and every allegation in said petition contained, except above admitted.

"Third—That the attachment caused by him to be levied on said property on the 21st day of November, 1888, was a legal and valid attachment; that a proper and sufficient affidavit for the issuance of said attachment was filed in said court.

"Fourth—That he obtained legal service in said action on said Frank A. Scoville, by publication, that said notice was in legal form and published in the *David City Tribune*, a newspaper of general circulation in said county, four weeks, the first publication being on the 6th day of December, 1888, and the last on the 27th day of December, 1888; that the proper affidavit therefor was filed in said court

before said notice was published; that the court obtained jurisdiction over the said Frank A. Scoville being an absconding debtor, non-resident.

"Fifth—That the said Flora E. Scoville was the agent of said Frank A. Scoville, authorized by him to prepare and verify said answer, and to appoint said Steele an attorney to appear for him in said action, and that she did so by virtue of said authority; that the court therefore acquired jurisdiction over said Frank A. Scoville by said appearance.

"Sixth—That said H. E. Rice was duly authorized by the State Bank of Valparaiso to sign and verify said answer; that the said Steele was authorized to appear as attorney for said bank.

"Seventh—As a further defense, defendant alleges that the plaintiff's attachment on said elevator is illegal and invalid; that it was issued in an action commenced in Saunders county against Frank A. Scoville; that said Scoville was then a non-resident and no service was had on him except by leaving a summons at his last place of residence; that such pretended service is no service and conferred no jurisdiction on said court over said Scoville, and the attachment therefore levied void.

"Wherefore defendant prays that said action may be dismissed and the injunction dissolved."

The reply is a general denial.

On the trial of the cause the court rendered a decree as follows:

"Now on this 8th day of August, A. D. 1890, the same being a day of the May term, 1890, of the district court of Butler county, this cause came on to be heard upon the pleadings and the evidence, and was submitted to the court, on consideration whereof the court finds upon issue joined in favor of the plaintiff as to the proceeds of the sale of the elevator in question, and in favor of the defendants as to the proceeds of the sale of the cribs, corn, and cobs in question.

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"It is therefore considered by the court that the defendant Daniel M. Deane be, and hereby is, perpetually enjoined from executing his judgment in said district court of Butler county against F. A. Scoville, George A. Crafts, and the State Bank of Valparaiso, and from proceeding upon the order of sale of attached property therein as against the rights and interests of the plaintiff herein upon his attachment as to the elevator named in said attachment and order of sale, and that the defendant Sumner Darnell, as sheriff of Butler county, be, and the said defendant sheriff hereby is, perpetually enjoined from proceeding on said order of sale in favor of the defendant Deane; and it appearing to the court that the proceeds of the sale of said elevator, as per stipulation on file in this action, is the sum of \$450, and that said sum is in the hands of said defendant Darnell, as sheriff, it is therefore by the court ordered that the defendant Darnell, as sheriff, pay the said sum of \$450 into the district court of Saunders county, to be applied to the payment of the plaintiff's judgment therein against F. A. Scoville and E. W. Scoville.

"It is further ordered that the injunction herein as regards the cribs, corn, and cobs in question be, and the same hereby is, dissolved, and that each party hereto pay costs made by and for himself herein."

In November, 1888, the Bank of Valparaiso was an institution doing business at Valparaiso, in Saunders county, with F. A. Scoville as president and George A. Crafts as cashier, both residing in Saunders county. Daniel M. Deane had deposited the sum of \$1,785 in that bank, taking therefor the usual certificate of deposit, signed by Scoville as president.

W. E. Bauer, the plaintiff herein, had dealings with Scoville as an individual, in the course of which Scoville became indebted to him in the sum of \$1,409 on a promissory note. Matters stood thus on the 20th day of November, 1888, at which time the bank ceased doing business.

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On the 21st day of November, Deane commenced an action in Butler county. He set forth his cause of action as follows:

"DANIEL M. DEANE,
v.
THE BANK OF VALPARAISO AND F. A.
SCOVILLE AND GEO. A. CRAFTS.

"The plaintiff complains of the defendants and says that on the 4th day of October, 1888, the plaintiff loaned the defendant the sum of \$1,785, at defendant's special instance and request, and at the same time the defendant executed and delivered to plaintiff a certificate of deposit in words and figures as follows:

"\$1,785.

BANK OF VALPARAISO.

"VALPARAISO, NEB., Oct. 4, '88.

"D. M. Deane deposited in this bank seventeen hundred and eighty-five dollars, payable to the order of himself on return of this certificate, properly indorsed, with interest at ten per cent.

F. A. SCOVILLE, *Pres't.*

"No part of said certificate has been paid out, and there is now due and payable from defendants to this plaintiff the sum of \$1,785, with ten per cent from October 4, 1888. Wherefore plaintiff prays for judgment against defendants for the sum of \$1,785, with ten per cent interest from October 4, 1888, until paid, with costs of suit."

He also sued out an attachment, filing an affidavit therefor.

On the 30th day of November, 1888, an amended petition was filed. That action was prosecuted to judgment, with order of sale, and it is that judgment and order of sale that the plaintiff herein seeks to have declared subject to his.

The petition, filed November 21, 1888, made but one party defendant, viz., the Bank of Valparaiso. It is true the title of the case runs "Daniel M. Deane v. State Bank of Valparaiso, F. A. Scoville, and George A. Crafts," but

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the body of the petition sets forth a cause of action against the bank alone, Scoville being mentioned only as signing the certificate of deposit as president of the bank, and Crafts not at all. It is not a cause where the allegations as to the liability of the defendants named are insufficient, but where no such allegations are contained in the pleading. This being so, the filing of an amended petition which contains the proper allegations was equivalent to bringing in new parties, and no lien could be obtained against their property until an action was in fact instituted against them. The defect, however, was supplied in the amended petition of November 30.

The elevator, cribs, etc., were, so far as appears, the personal property of Scoville, and did not belong to the bank, and, so far as appears, were not liable to sale upon an execution issued against the bank, although perhaps the property might be liable in subsequent proceedings. In this state an action is begun in the district court by filing a petition which should show a liability of the defendant to the plaintiff. If there are no allegations tending to show such liability, there is nothing to which the attachment can apply. The plaintiff brought his action in Saunders county, where the bank was located and where Scoville had resided. His attachment was levied upon the property in dispute, based upon a subsisting cause of action against Scoville stated in his petition, and his lien is prior in point of time to that of the defendant, as his lien against Scoville dates from the time of filing the amended petition. On some points there is a conflict in the evidence that we do not care to discuss, and it is unnecessary to decide whether or not the defendant should have brought his action in Saunders county.

There is no error apparent in the record and the judgment is

AFFIRMED.

THE other judges concur.

HENRY NAGEL V. LOOMIS & GILL.

[FILED NOVEMBER 25, 1891.]

1. **Attachment: AFFIDAVIT OF NON-RESIDENT.** The words "not a resident of the state" and "a non-resident of the state" mean the same thing, and where an affidavit for an attachment shows that the defendant is a non-resident of the state, no undertaking is necessary.
2. ———: **JURISDICTION: JUDGMENT.** In case of constructive service based on attachment of the debtor's property the judgment in form is against the debtor, the defendant, although the power of the court in that case can only be exercised over the property or money of the debtor within its jurisdiction, unless there is an appearance by the defendant.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

G. W. Bemis, and *E. E. Hairgrove*, for plaintiff in error.

John M. Ragan, *contra*.

MAXWELL, J.

The plaintiff brought an action before a justice of the peace by attachment against the defendants, who were non-residents, and recovered a judgment for the sum of \$102.45 and costs and an order for the application of certain funds to the payment of the judgment. The case was taken on error to the district court where the judgment of the justice was reversed. The following is the transcript of the justice:

"HENRY NAGEL }
v. }
LOOMIS & GILL. }

"July 15, 1887, plaintiff filed his bill of particulars, wherein he claims of the defendant the sum of \$102.45 for

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work and labor done and material furnished to defendants. Plaintiff also filed the following affidavit:

“‘STATE OF NEBRASKA, } ss.
CLAY COUNTY. }

“‘Before T. Weed, Justice of the Peace for Sutton Precinct.

“‘HENRY NAGEL
v.
LOOMIS & GILL, first names unknown. }

“‘Plaintiff, first being duly sworn, deposes and says that he has good reason to believe and does believe that the St. Joseph & Grand Island Railroad Company, a corporation doing business in Clay county, Nebraska, and the Kansas City & Omaha Railroad Company, a company doing business in Clay county, and within said county of Clay, has property of said defendant in their possession, to-wit, a large amount of money, and also that said railroad companies above mentioned are indebted to said Loomis & Gill to an amount unknown to affiant. HENRY NAGEL.

“‘Subscribed in my presence and sworn to before me this 15th day of July, 1887. T. WEED,

“‘Justice of the Peace.’

“‘Issued summons and order of attachment, returnable July 20, at 10 A. M., and placed the same in the hands of Daniel Cronin, a constable of Clay county, who made return as follows:

“‘I hereby certify that on July 15, 1887, I served on the managing agent of the St. Joseph & Grand Island Railroad Company, at their principal place of business in Clay county, Nebraska, the original summons, by handing O. G. Burrows, said managing agent, the same in writing, and the within is a true copy of said summons.

“‘I served also a true copy of the order of attachment.

“‘DANIEL CRONIN,

“‘Constable.’

“‘July 20, 1887, 10 A. M., O. G. Burrows appeared as

garnished agent for the said railroad company and under oath answered the following questions:

"Q. Are you the agent of the St. Joseph & Grand Island R. R. Co. at Sutton?

"A. I am.

"Q. Is that company indebted to Loomis & Gill in any sum?

"A. We believe we are indebted to them about \$1,500.

"It appearing from the answer of the St. Joseph & Grand Island Railroad Company that they have personal property, to-wit, money, of Loomis & Gill, defendants, in their possession liable to attachment in this case, it is hereby ordered that the St. Joseph & Grand Island Railroad Company pay into court said sum of \$102.45 and these costs, or give a bond for its safe keeping. It also appearing that the summons issued cannot be served on the defendants in this county, this cause is continued until August 30, 1887, at 10 A. M., for the purpose of publication, and such notice and affidavit are hereto attached.

"August 30, 1887, 10 A. M. This cause came on for hearing, upon the plaintiff's bill of particulars and the evidence. Henry Nagel sworn and testified in the case, and on consideration whereof I find there is due from the defendant to the plaintiff the sum of \$102.45. It is therefore considered by me that Henry Nagel, plaintiff, recover from Loomis & Gill, defendants, the said sum of \$102.45, and his costs, taxed at \$9.75, making a total of \$112.20.

"Judgment rendered this 30th day of August, 1887.

"T. WEED,

"Justice of the Peace."

We find also the following affidavit:

"HENRY NAGEL }
v. }
LOOMIS & GILL. }

"STATE OF NEBRASKA, } ss.
CLAY COUNTY. }

"Henry Nagel, being first duly sworn, deposes and says

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that he is the plaintiff in the above entitled action, and the claim in said action is on contract for labor, work, and materials furnished defendants; that the said claim is just and this affiant believes that the said plaintiff ought to recover the sum of \$102.45 thereon.

"Affiant further says that the defendants are not residents of the state of Nebraska, and have absconded to the the state of Missouri; and further this affiant says not.

"HENRY NAGEL.

"Subscribed in my presence and sworn to before me this 15th day of July, A. D. 1887.

T. WEED,

"Justice of the Peace."

The attorney for the defendants in error has filed no brief, so that we are left in doubt as to the points on which he relies.

"Section 925 of the Code provides: "The plaintiff shall have an order of attachment against the property of the defendant, in a civil action before a justice of the peace, for the recovery of money before or after the commencement thereof, when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing the nature of the plaintiff's claim, that it is just, the amount which the affiant believes the plaintiff ought to recover, and the existence of some one or more of the following particulars: First, that the defendant, or one of the several defendants, is a foreign corporation, or is a non-resident of the state; or second, has absconded, with intent to defraud his creditors; or third, has left the county of his residence to avoid the service of a summons; or fourth, so conceals himself that a summons cannot be served upon him; or fifth, is about to remove his property, or a part thereof, out of the county, with the intent to defraud his creditors; or sixth, is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or seventh, has property or rights in action which he conceals; or eighth, has assigned, removed,

or disposed of, or is about to dispose of, his property, or a part thereof, with intent to defraud his creditors; or ninth, fraudulently contracted the debt, or incurred the obligation for which suit is about to be or has been brought. When the defendant is a foreign corporation or a non-resident of the state, the attachment shall not be granted, unless the claim is for a debt or demand arising upon contract, judgment, or decree."

Section 926 provides: "When the ground of attachment is that the defendant is a foreign corporation, or a non-resident of the state, the order of attachment may be issued without an undertaking, but in all other cases the order of attachment shall not be issued by the justice until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the justice, an undertaking not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained."

It does appear from the record that the defendants were non-residents of the state. It is true the exact language of the statute is not employed, but the meaning is the same. No undertaking is required where the defendant is a non-resident of the state.

Objection seems to be made against the form of the judgment, that it is rendered against the defendants. This is the proper mode of rendering judgment: The debt is charged and proved against the defendant and a certain sum found due, whereupon the court renders judgment against the debtor, the defendant, and orders a sale of the attached property, or the payment of the money held by the garnishee. The form of the judgment is not changed by the mode of service, except that it should appear that the service is constructive, and, therefore, cannot be the foundation of an action in another state, and the power of the court is exhausted when the property of the debtor

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within its jurisdiction is applied upon the judgment. (*Crowell v. Johnson*, 2 Neb., 156.)

It is evident that the justice was fully warranted in all his proceedings, and there is no material error therein. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

33	504
141	809
33	504
52	713

FANNY C. WALKER v. E. A. WONDERLICK ET AL.

[FILED NOVEMBER 25, 1891.]

1. **Executions: WRONGFUL LEVY: OFFICER'S BONDSMEN LIABLE.** Where an officer with process against the property of A seizes, by virtue thereof, the property of B, he is guilty of official misconduct for which he and his sureties are liable on his official bond.
2. ———: ———: **PLAINTIFF LIABLE FOR DIRECTING.** Where the goods of B were wrongfully levied upon and sold on an execution and attachment against A, and the plaintiffs in those actions directed the levy and sale and indemnified the officer, they are jointly liable with him and his sureties for the wrong.

ERROR to the district court for Gage county. Tried below before APPELGET, J.

A. Hardy, for plaintiff in error, cited: *Shaw v. Rowland*, 32 Kan., 154; *Freeman*, Executions, sec. 273; *Cox v. Hall*, 18 Vt., 191; *Peterson v. Foli*, 67 Ia., 402; *McMannus v. Lee*, 43 Mo., 206; *Clark v. Bales*, 15 Ark., 452; *Williams v. Sheldon*, 10 Wend. [N. Y.], 654; *McIntyre v. Green*, 36 Ga., 48; *Vosburgh v. Moak*, 1 Cush. [Mass.], 453; *Williamson v. Fischer*, 50 Mo., 198; *Turner v. Killian*, 12 Neb., 580; *Noble v. Himeo*, Id., 193.

J. A. Vanorsdel, and *T. F. Burke*, contra, cited: *Hall v.*

Smith, 14 Bush [Ky.], 604; 11 Am. & Eng. Ency. Law, 1015, note 3, and cases cited; Dicey, Parties to Actions, 431; Bliss, Code Pl., sec. 83.

MAXWELL, J.

The plaintiff brought an action in the district court of Gage county against the defendants. Her petition is as follows:

“First—That prior to the 5th day of December, 1889, the defendant E. Wonderlick had been duly chosen constable in and for Blue Springs township, in Gage county, Nebraska, and on the 8th day of January, 1890, filed his official bond, duly approved by the board of supervisors of said county, with the county clerk of said county, with the defendants Lewis Borngasser, George Poffenbarger, and George B. Johnson as his sureties thereon; a duly certified copy of his said bond is hereto annexed, marked ‘A’ and made a part hereof; said Wonderlick then duly qualified as and become a constable in and for said county, and at the time hereinafter mentioned was an acting constable in and for said county; that thereafter, and on and prior to the 18th day of February, 1890, this plaintiff owned in her own right and was in possession of a stock of groceries and the fixtures necessary to carrying on a grocery store and a grocery business, and the same then being in a grocery store in the city of Blue Springs aforesaid; that the said stock of groceries and fixtures was then of the value of \$511.37; that the annexed, marked ‘B,’ is a true and correct inventory of said goods, and the values set opposite the several items true and correct values of the same at that time; that on said 18th day of February the plaintiff was engaged in and carrying on the business of a retail grocer with said goods in said store in Blue Springs aforesaid and had a fair trade in her business; that on said 18th day of February the defendant Wonderlick, acting by virtue of his office as such constable, wrongfully seized and took into his possession all of the said goods and fixtures of the

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plaintiff, under an order of attachment in favor of said Blue Springs Bank, and against one S. T. Walker, and under an execution in favor of said Black Bros., said defendant then well knowing that said goods belonged to this plaintiff, and the execution being against S. T. Walker, and then wrongfully closed the plaintiff's store and destroyed her business, and converted all of said goods to this defendant's use, except \$250.04 worth thereof at the prices mentioned in said 'Exhibit B,' which was on the 11th day of March, 1890, returned to the plaintiff; that by reason thereof the plaintiff has been damaged in the sum of \$261.33, the value of said goods so taken and not returned, and in the further sum of \$250, by reason of the breaking up and destroying of her business and her business credit.

"Second—For a second cause of action the plaintiff alleges that on and prior to the 18th day of February, 1890, this plaintiff owned in her own right and was in possession of a stock of groceries and fixtures necessary to carrying on a grocery store and the grocery business, the same then being in a grocery store in the city of Blue Springs, aforesaid; that said stock of groceries and fixtures was then of the value of \$511.37; that the annexed, marked 'B,' is a true and correct inventory of said goods, and the values set opposite the several items were true and correct values of the same at that time; that on said 18th day of February the plaintiff was engaged in carrying on the business of a retail grocer with said goods in said store in Blue Springs aforesaid and had a fair trade in her business; that on said 18th day of February, the defendant Wonderlick was an acting constable in and for said county; that on said 18th day of February, the defendant the Blue Springs Bank had in the hands of said Wonderlick, as constable, an attachment against the goods and chattels of one S. T. Walker, and not against the goods and chattels of this plaintiff; that at the request and by the direction of the said bank, defendant, and upon its agreeing to indemnify him,

and at the request and by the direction of the defendants Black Bros., who had an execution in the hands of said constable against the goods and chattels of S. T. Walker and not against the goods and chattels of this plaintiff, and upon their agreeing to indemnify him, the said defendant Wonderlick, constable as aforesaid, under and by virtue of said attachment and said execution, and by virtue thereof, on said 18th day of February wrongfully seized and took into his possession all of the said goods and fixtures of this plaintiff, he well knowing that said goods and chattels belonged to this plaintiff, and then and thereby wrongfully closed the plaintiff's store and destroyed her business, and converted all of said goods to the use and benefit of these defendants, said bank and said Black Bros., for them and at their request, except \$250.04 worth thereof, at the prices mentioned in said 'Exhibit B,' which was on the 11th day of March, 1890, returned to this plaintiff; that by reason thereof the plaintiff has been damaged in the sum of \$261.33, the value of said goods so taken and not returned, and in the further sum of \$250, by reason of breaking up and destroying her business credit, in all the sum of \$511.33.

"Wherefore the plaintiff asks judgment against all of said defendants in the sum of \$511.33, with interest thereon from the 18th day of February, 1890, and costs."

The defendants separately demurred to the petition upon the ground, first, that several causes of action were improperly joined; and second, that the petition does not state facts sufficient to constitute a cause of action. The demurrer was overruled as to Wonderlick, and sustained as to the other defendants, and the action as to them dismissed.

In *Turner v. Killian*, 12 Neb., 580, and *Noble v. Himeo*, Id., 193, it was held that where an officer with process against the property of one person seizes by virtue thereof the property of another, he is guilty of official misconduct

for which he and his sureties are liable on his official bond. This decision was rendered after a careful examination of the law on the subject, and will be adhered to. The sureties are liable, therefore, if the allegations of the petition are true. The bank and Black Bros. are also liable if the allegations of the second count are true.

It is alleged "that at the request and by the direction of said bank, defendant, and upon its agreeing to indemnify him, and at the request and by the direction of the defendants Black Bros., who had an execution in the hands of said constable against the goods and chattels of S. T. Walker, * * * and upon their agreeing to indemnify him," etc., the goods were levied upon and sold.

In *Sprague v. Kneeland*, 12 Wend. [N. Y.], 161, it was held that the officer who attached the goods, the one who took them from him on an execution in the attachment suit and the plaintiff in that action, were all responsible as joint wrong-doers. To the same effect are *Shaw v. Rowland*, 32 Kan., 154; *Cox v. Hall*, 18 Vt., 191; *Peterson v. Foli*, 67 Ia., 402; *Clark v. Bales*, 15 Ark., 452; *McMannas v. Lee*, 43 Mo., 206; Cooley on Torts, 135-6.

One who contributes to a wrongful act or advises or procures it to be done, is equally liable with the person committing the offense. If the allegations of the petition are true, the officer, with an execution and attachment in favor of Black Bros. and the bank and against one Taylor, levied the same upon the stock of goods of the plaintiff, sold the goods and broke up her business. This levy and sale were made, it is alleged, by direction of the bank and Black Bros., and upon their agreeing to indemnify the officer. If the proof should sustain these charges, all parties who participated therein would be liable. It may be that the goods were fraudulently transferred to prevent the payment of debt or for other cause, but that question must be raised by answer.

There is no misjoinder of causes of action, and as the

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demurrers apply to both counts of the petition, they are overruled. The judgment of the district court against all but Wonderlick is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ESTATE OF HAMILTON MOORE V. JOSEPHUS MOORE.

[FILED NOVEMBER 25, 1891.]

83	509
149	12
51	605
151	654
53	749

1. **Administrator: APPOINTMENT.** By section 177 of chapter 23 of Compiled Statutes, jurisdiction is conferred upon the county court of the county where the deceased person was a resident at the time of his death, to grant letters of administration. Where the deceased was a non-resident of the state, leaving property in this state to be administered, an administrator may be appointed, in a proper case, by the county court of any county in which there is an estate to be administered.
2. ———: ———: **THE PETITION** for the appointment of an administrator must allege the necessary facts which confer jurisdiction, and if it fail so to do, the appointment and all subsequent proceedings are without jurisdiction and void.
3. ———: ———: **CANNOT BE QUESTIONED COLLATERALLY.** Where a sufficient petition for administration is presented to the proper court and the statutory notice is given, the action of the court in appointing an administrator cannot be questioned on the hearing of objections to the allowance of a claim presented against the estate. It will be presumed to have acted upon sufficient evidence.
4. **Administration: GRANTED AS TO REALTY ALONE.** Where a deceased intestate leaves no personalty, but an estate in lands, and owes debts, for the payment of which it is necessary to sell the lands, administration may be granted upon the basis of the real property alone.

ERROR to the district court for Dawson county. Tried below before HAMER, J.

J. W. Smith, and *H. M. Sinclair*, for plaintiff in error, cited, contending that the probate court was without jurisdiction, and its grant of administration void: *Hawes*, Jurisdiction of Courts, sec. 74; *Patillo v. Barksdale*, 22 Ga., 358; *Crosby v. Leavitt*, 4 Allen [Mass.], 411; *Embry v. Millar*, 1 A. K. Marsh [Ky.], 221; *Christy v. Vest*, 36 Ia., 286; *Miltnerberger v. Knox*, 21 La. An., 399; *Pinney v. McGregory*, 102 Mass., 189; *Thomas v. People*, 107 Ill., 517; *Stevenson v. Superior Ct.*, 62 Cal., 60; *Griffith v. Frazier*, 8 Cranch [U. S.], 9; *Outts v. Haskins*, 9 Mass., 543; *Holyoke v. Haskins*, 5 Pick. [Mass.], 20; *Wales v. Willard*, 2 Mass., 120; *Milia v. Simmons*, 45 Wis., 834.

Connor & Woodruff, *contra*, cited, in reply to the contention: Gary's Prob. Law, secs. 33, 34, 36, 37, 178; Schouler's Ex. and Adm., secs. 24, 25, 27, 92; *Lees v. Wetmore*, 12 N. W. Rep. [Ia.], 238; *Hobson v. Ewan*, 62 Ill., 146; *Schnell v. Chicago*, 38 Id., 390; *Bowles v. Rouse*, 3 Gilm. [Ill.], 408; *Wales v. Willard*, 2 Mass., 120.

NORVAL, J.

The defendant in error, Josephus Moore, in January, 1888, filed his petition in the county court of Dawson county, praying that letters of administration be granted upon the estate of his deceased father, Hamilton Moore. Subsequently, upon the hearing had for that purpose, letters of administration were granted upon said estate to one John B. Sheldon, who qualified as such officer and entered upon the discharge of the duties of his office. Afterwards, on the 12th day of July, 1888, the defendant in error presented to said county court the following claims against the estate, to-wit:

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ESTATE OF HAMILTON MOORE, DECEASED,

In account with JOSEPHUS MOORE.

	Dr.	Cr.
To labor from March 1, 1873, to November 1, 1885, with the exception of eleven months.....	\$3,525 00	
1873-1874. To moneys laid out and expended	315 00	
February, 1887. To moneys laid out and expended.....	75 00	
June, 1884. To moneys laid out and expended.....	575 00	
July, 1885. To moneys laid out and expended.....	200 00	
October, 1885. To moneys laid out and expended.....	400 00	
October, 1885. For breaking done for Hamilton Moore.....	30 00	
By moneys had at various times from March 1, 1873, to October 1884.....		\$300 00
By balance.....		4,820 00
	<u>\$5,120 00</u>	<u>\$5,120 00</u>

On the 16th day of August, 1888, Sylvanus Moore, one of the heirs of said estate, filed with said court written objections to the allowance of said claim on the following grounds:

"First—The court had no jurisdiction to appoint an administrator, and the pretended administration of said estate is unauthorized and void.

"Second—That the said estate is not indebted to Josephus Moore, the claimant, in any sum whatever."

On the hearing the county court allowed the sum of \$2,500 on said claim. The contestant took an appeal to the district court, where the cause was tried to a jury, and a verdict was returned for the claimant for \$2,705. Syl-

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vanus Moore brings the case into this court for review, by petition in error.

It is contended that the order of the county court appointing the administrator, and all subsequent proceedings thereunder, are without jurisdiction, and this for the reason that Hamilton Moore was not an inhabitant of this state at the time of his death, and left no estate in Dawson county, nor in this state, to be administered upon.

Section 177, chapter 23, Compiled Statutes, bearing upon the question presented for our consideration, reads as follows:

"Sec. 177. When any person shall die intestate, being an inhabitant of this state, letters of administration of his estate shall be granted by the probate court of the county of which he was an inhabitant or resident at the time of his death. If such deceased person, at the time of death, resided in any other territory, state, or country, leaving estate to be administered in this state, administration thereof shall be granted by any probate court of any county in which there shall be estate to be administered; and the administration first legally granted shall extend to all the estate of the deceased in this state, and shall exclude the jurisdiction of the probate court of every other county."

By these provisions the legislature has conferred jurisdiction upon county courts to grant letters of administration in two classes of cases: First, where the deceased person was an inhabitant of the state at the time of his death; and second, where the deceased person was a non-resident of this state when he died, but left an estate to be administered in this state. Where the deceased was a resident of the state, the county court of the county where he resided has exclusive authority to grant letters testamentary or of administration, but in case the deceased person's last place of residence was in another state, territory, or country, the application for letters of administration may be made to the county court of any county of this state in

which there is property to be administered, and the letters first granted extend to all the property or estate of the deceased in the state, wherever the same may be. The application for the appointment of an administrator must allege the necessary jurisdictional facts, for if a want of jurisdiction affirmatively appears from the face of the record, it is fatal to the proceedings, and the objection can be urged at any time. Stated differently, where there is a total failure to allege a fact upon a vital point in the petition, the county court acquires no jurisdiction to act, but where there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are merely voidable. (*Hyde v. Redding*, 16 Pac. Rep. [Cal.], 380; *Sitzman v. Pacquette*, 13 Wis., 291; *Frederick v. Pacquette*, 19 Wis., 569; *Chase v. Ross*, 36 Id., 267; *Wales v. Willard*, 2 Mass., 120; *Schouler's Ex. & Adm.*, secs. 91, 92.)

The right of the plaintiff in error to question the authority of the county court to grant letters of administration on the hearing of his objection to the allowance of the claim filed against the estate, depends upon whether the record of the county court on its face shows the lack of jurisdiction to make the appointment. It cannot be doubted that where a sufficient petition for administration is presented to the proper county court, and the statutory notice is given, its action in appointing an administrator is valid and binding unless revoked, or set aside on appeal. It will be presumed to have acted upon sufficient evidence. (*Hobson v. Ewan*, 62 Ill., 146; *Johnson v. Johnson's Estate*, 66 Mich., 525; *Lees v. Wetmore*, 58 Ia., 170.)

It appears from the averments in the application made to the county court for administration, that Hamilton Moore, at the time of his death, was not a resident of Dawson county; that he had no personal property, but was "equitably seized and possessed of real estate consisting of the southeast quarter of section 12, town 9, range 19 in said county and state." Upon the trial in the district court the

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plaintiff in error introduced in evidence a deed of said real estate executed by Hamilton Moore, a short time prior to his death, to Hannah Moore and Hattie Moore. This for the purpose of showing that the deceased left no property in Dawson county, and for that reason the county court acted without jurisdiction. From what we have already said it is obvious that whether or not the deceased owned the land was quite immaterial. That question could not be raised on the hearing of an appeal from the allowance of a claim against the estate. A county court has jurisdiction to grant letters of administration, although the deceased has no personal property, where he owns an estate in lands, and owes debts for the payment of which it is necessary to sell the real estate. The legislature has provided for the sale of lands of deceased persons by administrators and executors for the payment of debts when the personalty in their hands is not sufficient for that purpose.

Section 67, chapter 23, Compiled Statutes, provides that "When the personal estate of any deceased person, in the hands of his executors or administrators, shall be insufficient to pay all his debts, with charges of administering his estate, such executors or administrators may sell his real estate for that purpose, upon obtaining a license therefor, and proceeding therein in the manner hereinafter provided."

Section 76 provides that "The proceeds of any real estate sold for the payment of debts and charges of administration, as provided in this subdivision, shall be deemed assets in the hands of the executor or administrator, in like manner as if the same had been originally a part of the goods and chattels of the deceased," etc.

By these provisions the legislature has made lands assets for the payment of the debts of a decedent, in the event of a failure of personalty, and it is perfectly clear that administration may be granted upon the basis of real estate alone, where it is made to appear that an administrator is necessary.

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It is nowhere alleged in the petition for administration that Hamilton Moore was a non-resident of this state when he died, nor is any fact averred from which such inference can be drawn. The only statement in the petition as to residence is that he was a resident of Dawson county until a short time preceding his death, from which it cannot be inferred that he was an inhabitant of some other state at the date of his death. It not appearing from the petition that the deceased was either an inhabitant of Dawson county or a non-resident of this state, the county court had no jurisdiction to appoint an administrator, and it follows that all subsequent proceedings are void. Having reached this conclusion, the judgment of the district court must be reversed and the action dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

JERRY ACKERMAN V. J. F. BRYAN ET AL.

33	515
59	156

[FILED NOVEMBER 25, 1891.]

1. The Petition examined, and *held* to state a cause of action.
2. Verdict. A verdict will not be set aside for errors committed without prejudice to the plaintiff in error.
3. ———. Where a verdict is returned for the plaintiff in an action upon contract, the defendant cannot complain that the verdict is not justified by the evidence because, under the contract, plaintiff should have recovered a larger sum, or nothing. (*Fischer v. Holmes*, 24 N. E. Rep. [Ind.], 377.)

ERROR to the district court for Gage county. Tried below before BROADY, J.

A. Hardy, for plaintiff in error, cited: *Wasson v. Palmer*, 13 Neb., 378; *Ballard v. State*, 19 Id., 619; *Fitzgerald v. Meyer*, 25 Id., 82; *Greer v. Blanchard*, 40 Cal., 194; *Schuyler Natl. Bank v. Bollong*, 24 Neb., 828; *Peck v. Lake*, 3 Lans. [N. Y.], 136; *Tibbetts v. Sternberg*, 66 Barb. [N. Y.], 201; *Van Every v. Fitzgerald*, 21 Neb., 36-41; *Thompson, Trials*, 1970, and cases; *St. Louis Brewing Co. v. Bodeman*, 12 Mo. App., 573.

R. S. Bibb, contra.

NORVAL, J.

This action was brought in the court below by the defendants in error to recover the sum of \$75 as commissions for the purchase of real estate for the plaintiff in error.

The petition alleges, in substance, that the plaintiffs are engaged in the business of buying and selling real estate upon commissions; that on or about the 10th day of May, 1889, the defendant requested the plaintiffs to purchase for him a certain farm owned by one Matt Williams, at the price of \$2,000; that the defendant then and there agreed to pay the plaintiffs the sum of \$75 if they purchased for him said farm at the said sum of \$2,000 as payment for the services of the plaintiffs in making the purchase; that plaintiffs, in pursuance of said employment and agreement, purchased for said defendant said farm at the agreed price of \$2,000, and were ready, willing, and able to deed or cause to be deeded to the defendant, said farm; that the defendant, after the plaintiffs had procured for him said land at the price, and upon the terms agreed upon, refused to take said land, and has ever since refused, and still refuses to take the same, and has ever since refused, and still refuses to pay the plaintiffs the said sum of \$75 so agreed upon, as payment for their services, although often requested so to do, to the plaintiffs' damage in the sum of

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\$75, with interest thereon at seven per cent from June 1, 1889.

The answer is a general denial. The cause was tried to a jury, with a verdict for the plaintiffs in the sum of \$19.

Upon the trial, the defendant objected to the introduction of any testimony for the reason that the petition fails to state facts sufficient to constitute a cause of action, which objection the court overruled. This ruling is the first error complained of. The petition, liberally construed, states a cause of action. It avers the employment of the plaintiffs by the defendant, to purchase for him the farm at a stipulated price; that the defendant agreed to pay for said services the sum of \$75, in the event the plaintiffs made the purchase; that the plaintiffs procured the land at the price and upon the terms agreed upon, but that the defendant refused to take the same, or to pay the plaintiffs for their services. This was sufficient averment of performance of the contract on the plaintiffs' part and breach thereof by the defendant. It was not necessary to allege that they procured a deed to be made and tendered it to Ackerman, as the action was not brought to recover any portion of the purchase price of the land, but for commissions claimed to have been earned in negotiating the purchase. When the plaintiffs obtained the consent of Mr. Williams, the owner of the land, to convey it for the \$2,000, and the defendant refused to pay the money and complete the deal, nothing further was required of the agents to entitle them to compensation for their services from Ackerman, in case there existed a contract of employment. What has been here said disposes of the criticisms made upon the instructions. The charge of the court, taken as a whole, fairly submitted the case to the jury.

A. M. McMasters, one of the plaintiffs, testified that Ackerman made the contract of employment with the witness, and to the terms of the agreement. He further testified that he made a memorandum of the contract in the

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presence of the defendant, which paper was received in evidence over the defendant's objection. If there be any error in this ruling, it was not prejudicial to the party here complaining. There is nothing in the memorandum which in the least degree tends to show that the defendant employed the plaintiffs to purchase the farm or that he ever promised to pay them therefor. If anything the paper contradicts the plaintiffs.

It is finally urged that the verdict is not justified by the evidence. There was testimony given by the plaintiffs to the effect that they were employed by the defendant to purchase the farm for him at a stipulated sum, for which services he agreed to pay as commissions the sum of \$75; no more and nothing less. The defendant testified that he did not employ them and never promised to pay them anything. In no view of the evidence were the jury justified in returning of a verdict for \$19. The plaintiffs were entitled to recover \$75 and interest thereon, or nothing. The jury, having found that the parties made the contract sued on, the defendant cannot complain because the verdict was not for a larger sum. (*Fischer v. Holmes*, 24 N. E. Rep. [Ind.], 377.) The authorities cited in the brief of plaintiff in error would be applicable if the defendants in error were seeking a reversal of the case on the ground that the verdict was too small. There being no prejudicial error in the record, the judgment is

AFFIRMED.

THE other judges concur.

S. S. CURTIS, APPELLEE, V. A. J. PERRY ET AL., APPELLANTS.

[FILED NOVEMBER 25, 1891.]

1. **Burden of Proof:** WHEN PAYMENT IS PLEADED as defense the burden is upon the party asserting such facts to establish it by a preponderance of the evidence.
2. **Review.** *Held*, That the findings and judgment are supported by the evidence.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

D. Van Etten, for appellants.

Charles W. Haller, contra.

NORVAL, J.

This suit was brought by appellee to foreclose a mortgage on lot 1, block 6, of Belvidere addition to Omaha, given by the defendant Alfred John Perry to secure his three promissory notes of \$100 each bearing date December 24, 1885, due in one, two, and three years respectively, and drawing eight per cent interest. Subsequently Perry and wife, who are made defendants, conveyed the lot to the defendant Julia Flannagan, the present owner. The defendant John Flannagan is the husband of Julia. The Perrys failed to answer and a default was entered against them. The Flannagans pleaded payment and set up in the answer a claim for damages on account of the failure of the appellee to release the mortgage of record. The reply was a general denial. The court found that there was due the plaintiff \$353.10, and a decree of foreclosure was entered. The Flannagans appeal.

It is uncontradicted that the plaintiff, through one J. B.

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Parrotte, sold the lot in December, 1885, to Perry, then a soldier stationed at Fort Omaha, for the stipulated sum of \$400. Perry paid \$100 in cash, and gave the notes and mortgage in controversy in security for the remainder of the purchase price, and received a deed for the lot. At the time of the purchase there was a verbal agreement between Perry and Parrotte to the effect that if the former should be removed from Fort Omaha, the latter was to take the lot off Perry's hands, or procure a purchaser for him, so he would get his \$100 back with interest. In the spring of 1886 Perry notified Parrotte that he was going to be removed from Fort Omaha, and on April 16th of the same year Parrotte sold the lot to the Flannagans for \$500, or \$200 above the mortgage in controversy, the payment of which they assumed in the deed. Of the \$200 there was paid \$100 in cash and a second mortgage was given to J. B. Parrotte by Mrs. Flannagan to secure her note for \$100, which mortgage was not recorded. Upon one of the notes in controversy there is a credit of \$35 under date of June 24, 1886, for which payment a receipt was given to John Flannagan, which was produced and introduced in evidence upon the trial in the district court. It is also undisputed that on April 30, 1886, the plaintiff, through his agent, sold lot 4 in said block 6 to the appellant, Julia Flannagan for \$400, the terms being \$100 cash and her note for \$300, due in two years at eight per cent interest, secured by mortgage on the lot.

It is the theory of the appellants, and there is in the record evidence tending to support it, that the notes and mortgage involved in this suit were paid off by the appellants on the 30th day of April, 1886, by John Flannagan giving his check on an Omaha bank for \$300, bearing that date, payable to the order of C. E. Mayne, a real estate dealer of the city, who made collections for plaintiff, and with whom the plaintiff officed. That such a check was given by Flannagan, endorsed by Mayne, and paid by the

bank, is indisputable. John Flannagan testified that he gave this check in payment of the mortgage executed by Perry. There is also other testimony introduced on behalf of appellants, tending to support this view.

The plaintiff contends that the proceeds of the check were not applied on the mortgage in controversy, and it was not the intention of the appellants that they should be so applied, but that Mr. Flannagan went into Mr. Mayne's office, left the \$300 check, and, under his directions, it was applied as follows: \$100 as the first cash payment on lot 4; \$100 to take up \$100 Parrotte note and mortgage, which had been left with Mr. Mayne for collection, and \$100 to be credited on the \$300 note and mortgage of Julia Flannagan, covering said lot 4.

The appellee's theory of the transaction is not without testimony to sustain it. David Jameson, who was the cashier and bookkeeper of C. E. Mayne, from September 1885 to October, 1886, and had charge of his collections, was called as a witness by the appellee, and on being interrogated in regard to the check given by Flannagan to Mayne, answered as follows: "This check of \$300 was offered by Mr. Flannagan in payment of the first payment of \$100 on lot 4, in block 6, in Belvidere, and in payment of \$100 of a note given to J. B. Parrotte, dated April 17, 1886, due in two years after date, signed by Julia Flannagan, and witnessed by myself, and also in payment of an endorsement of \$100, entered under date of April 30, 1886, upon a note of \$300, given by Julia Flannagan to Samuel S. Curtis, dated April 30, 1886. The payment, although made May 3, was indorsed on the note of \$300 under date of April 30—same date as the note—so that interest would be cancelled on that \$100 from the date of the note." On cross-examination the witness further testified that the check came into his hands on May 3, and was so credited at the request of Mr. Flannagan; that while the sale of lot 4 was made on April 30, and the notes and mortgages

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were executed that day, the transaction was not closed up until May 3.

The testimony of Mr. Jameson is corroborated by other testimony appearing in the record. The \$100 note given by Mr. Flannagan to Parrot as part consideration for lot 1, which was introduced in evidence by the appellants, has a receipt written across its face for \$100, dated May 3, 1886, and signed by Jameson. The \$300 note given by Mrs. Flannagan as part payment for lot 4, has a credit thereon of \$100, under date of April 30, 1886. Appellants do not claim to have made any payment upon this note, but according to their testimony, they went into Mr. Maynes office on June 22, 1887, to lift the note, when they gave him \$376, and he returned to them \$76, stating at the time that they had paid that amount too much. We find, however, a receipt on the face of the note for \$219.50 bearing date June 22, 1887, which sum, after deducting the \$100 indorsement, was the balance then due on the note. Again, the \$300 check was insufficient to discharge the Perry notes and mortgage involved in this suit. They had been on interest over four months when the check was given, and at that time nothing had been paid. Counsel for appellants suggest that probably the balance was paid in cash, or perhaps the interest was deducted because paid so soon. We answer, there is nothing in the testimony to sustain such a theory. The payment of \$35 on one of these notes by John Flannagan on June 24, 1886, nearly two months after the \$300 check referred to was given, is inconsistent with the claim of appellants that the Perry notes were taken up by the check. Should it be suggested that appellants supposed the \$35 payment was to be credited on the \$300 note secured by mortgage on lot 4, we reply we find no such explanation in the testimony, besides such position is equally incredible. Had appellants supposed that the \$35 was credited on the \$300 note we cannot believe that they would have tendered \$376 in payment of

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the note, as they contend, which at the time had been on interest less than fourteen months with a credit of \$35. There would have been less than \$300 due on the note at the time referred to. John Flannagan in his testimony says he was astonished when he got back the \$76.

The appellants admitted the execution of the notes and mortgage, and pleaded payment. The burden of proof, therefore, was upon them to make out their defense by a preponderance of the evidence. (*Magenau v. Bell*, 14 Neb., 7; *Tootle v. Maben*, 21 Id., 617.) Had the district court sustained their defense it would not have been entirely unsupported by the testimony. The court, however, found against the plea of payment, and from a careful consideration of the testimony we are not prepared to say that the finding is wrong.

The conclusion reached disposes of the appellants' claim for damages for failure of appellee to release the mortgage.

Objection is made in appellants' brief that there was no service of summons upon the Perrys. The amended transcript shows that on October 10, 1888, a summons was issued for the Perrys, directed to the sheriff of Douglas county, who duly appointed Martin Gilfoil to serve the same, and the person thus appointed on October 19, 1888, made return upon oath that it was personally served upon the defendants in Lincoln county in the then territory of Washington. The service was authorized by the code. (Section 81; *Cheney v. Harding*, 21 Neb., 68.)

Had there been no service of process upon the Perrys the appellants would have no ground for complaint, for the reason that the Perrys were not absolutely necessary parties to the suit. The appellants are the owners of the equity of redemption, having acquired all the title of the mortgagor, and the Flannagans were the only persons necessary to have been made defendants. The judgment is

AFFIRMED.

THE other judges concur.

33	524
40	693
33	524
58	419

VICTOR G. LANTRY ET AL. V. ADELBERT FRENCH.

[FILED DECEMBER 18, 1891.]

Negotiable Instruments: MORTGAGES: CONTINGENT MATURITY. A mortgage was given to secure the payment of the sum of \$500 five years from the date thereof, with interest thereon at ten per cent, payable annually, in advance, at the office of A. R., at B., Nebraska, for which coupon notes were attached payable as above, and it was therein provided that in case said note, or any coupon interest note attached thereto, should not be so paid, then the whole of said note and mortgage should become due at once, and thereupon the mortgagee should have the immediate right to foreclose said mortgage. *Held*, That when the amount of any interest coupon was not paid or tendered at the place of payment on the day it became due, or within three days thereafter, the whole amount of unpaid principal and interest up to said date became due, and the said mortgage foreclosable therefor.

ERROR to the district court for Washington county.
Tried below before HOPEWELL, J.

W. H. Eller, for plaintiffs in error, cited cases referred to in opinion.

W. C. Walton, *contra*.

COBB, CH. J.

The plaintiffs' petition was filed in foreclosure December 1, 1888, alleging that on June 30, 1885, the defendants, Marion R. Kindred and Delilah, his wife, executed to Lucy M. Mellen their promissory note for \$500, payable June 30, 1890, with interest at ten per cent per annum, payable annually, in advance, at the office of Alex. Reed, in Blair, Nebraska, for which coupon notes were attached, drawing interest at ten per cent per annum from maturity. Those due at the bringing of this suit were the third and fourth, payable June 30, 1888, and June 30, 1889. They were

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secured by a mortgage on the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ sec. 34, town 20, range 11, and lots 1 and 2 in block 17, also lots 11, 12, 13, 14, and 15, in block 19, in the city of Blair, Nebraska. One of the conditions of the mortgage was "that in case said note, or any coupon interest note attached thereto, should not be so paid, then the whole of said note and mortgage should become due at once," and thereupon the said Mellen should have the right to the immediate possession of said real estate, and to foreclose said mortgage to pay said note. The appellant Lantry, who had bought the land subject to the mortgage, was made a party defendant, and was required to truly disclose any and all interest he may have in said mortgaged premises, and judgment for deficiency was prayed against him.

The defendant Lantry was admitted to answer April 1, 1889, and which answer alleges:

"1. That he admits execution and delivery of the notes and coupons attached and described in plaintiff's petition, and made by the defendant Kindred. He also admits the execution and delivery of the mortgage deed therein described, and the recording thereof alleged, and that the defendant is now owner of said land.

"2. This defendant further answering alleges that the said note and interest coupons are by their terms made payable at the office of Alex. Reed, in Blair, Nebraska, and this defendant has been at all times and now is ready to pay the same, when duly presented for payment at the said office; that prior to the commencement of this suit, and at sundry times, he caused inquiry to be made at the office of Alex. Reed, in Blair, Nebraska, for said notes and coupons and was unable to find them, and he alleges that said note and coupons were never presented for payment at said office.

"3. That subsequent to the 30th day of June, 1888, he tendered payment in currency and treasury notes of the United States, and other notes of the United States, duly

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declared to be legal tender for the payment of debts, the sum of \$50, and paid said money, the sum of \$50, to Edna M. Getty, then doing business and chief clerk in the office of Alex. Reed, as aforesaid; that the other coupon is not due until the 30th day of June, 1889, wherefore there is no default in the terms and conditions of said mortgage."

The plaintiff demurred generally to the answer, which was taken under advisement until September 21, 1889, when the demurrer was overruled, and the court found there was due the plaintiff on the promissory note set forth, with interest to September 16, 1889, \$611.87. That to secure the payment, defendants M. R. Kindred and Delilah, his wife, executed the mortgage described, and that its conditions have been broken, and that defendant, V. G. Lantry, has purchased the premises. It was ordered that unless the defendants Kindred, within twenty days from September 21, 1889, pay to the clerk of the court said sum, with interest from the first day of this term, with costs of suit, their equity of redemption be foreclosed and the mortgaged premises be sold by the sheriff as upon execution, and report to the court for further order. To which the defendant Lantry excepted.

The coupon note, on which this suit was brought, was due June 30, 1888, five months prior to the commencement of the suit. According to the terms of the note and mortgage, when the coupon note of June 30, 1888, became due and remained unpaid, the principal note and the interest coupons attached became due and payable at once. The fact set up in the answer of the appellant, that he made inquiry at the office of Alexander Reed, in Blair, Nebraska, for the note and coupons, prior to the commencement of the suit, for the purpose of paying them, and that subsequent to June 30, 1888, he tendered payment, in legal tender notes of the United States, the sum of \$50, and paid the same to Edna M. Getty, chief clerk in the office of Alexander Reed, is not a defense to the action. It does

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not appear that the tender was made within three days of the maturity of the note, nor that three months had not elapsed from the maturity of the note to the fact of the tender. It is even claimed by the appellee, and not controverted, that the action was commenced before the tender set up in the answer. That there was then due \$550, so that the tender was not a defense, and the demurrer to the answer was well taken.

The example cited by appellant of *Robinson v. Cheney*, 17 Neb., 673, is an instance where the tender and payment were made at the bank designated, within three days after the notes became due. It lacks the premises of the present case.

In the second case cited, of *Ballard v. Cheney*, 19 Neb., 58, it was held, as in the first case, that "When a bank is designated as the place at which a purchase-money note is to be paid, the maker is not in default in not paying the same until the note is received at the bank." Fully justifying this rule, in that case, was the fact that the vendor was a non-resident of the state, the notes were never sent to or left with the bank at which payment was to be made, but the money was left there for their payment before their maturity. It has the conditions precedent to the strict construction of the contract of purchase by the vendor.

The salient difference in the case at bar to the cases cited is, that the tender was not made in due time and maintained; nor does it appear from the answer of the appellant that the note was not, on June 30, 1888, and thenceforward, at the office of Alexander Reed, designated as the place of payment. The judgment of the district court is

AFFIRMED.

THE other judges concur.

LISH NELSON V. STATE OF NEBRASKA.

[FILED DECEMBER 18, 1891.]

MURDER: OFFICER WITHOUT WARRANT: SENTENCE REDUCED.

The plaintiff in error was convicted of murder in the second degree and sentenced to the penitentiary for life, upon indirect and circumstantial evidence that he had shot a policeman in pursuit and arrest of him, in the night time, without warrant or knowledge of crime committed. *Held*, that the sentence be reduced to twenty years' imprisonment under sec. 502a, Code of Criminal Procedure.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Capps, McCreary & Stevens, for plaintiff in error.

George H. Hastings, Attorney General, contra.

No briefs filed.

COBB, CH. J.

The plaintiff in error was arraigned, tried, and convicted on December 11, 1888, of murder in the second degree for the homicide of C. J. Balcom, by gun-shot, on the night of August 5, 1888, at the city of Hastings.

The prisoner's motion for a new trial was overruled and he was sentenced to life imprisonment in the penitentiary of the state. The record of the trial is preserved in the bill of exceptions, brought here on a petition in error, and heard on a motion for the modification of the prisoner's sentence.

From the record it appears that the prisoner was a colored waiter, aged 17, at the Western hotel in Holdrege, and having committed larceny of a watch, made his way on a baggage car to Hastings. Suspicion of larceny attaching

to the prisoner, the police officer of Hastings was notified to apprehend him, which the watchman at the railroad station attempted to do without warrant and with the outcry, in the prisoner's hearing, "there goes the black s— of a b—," at the same time throwing the light of a dark lantern suddenly in the prisoner's face, at which he fired on the watchman and ran. The watchman died of the wound the following day, after making his *ante mortem* declaration against the prisoner, which was admitted in evidence on the trial. The prisoner's explanation of his motive for firing was that he thought the sudden light from the dark lantern was the flash of a pistol aimed at him.

The watchman was without evidence or authority to arrest the prisoner for crime, except the dispatch from Holdrege, which was admitted in evidence over objections by the ruling of the court, that "It was admitted, not as the best evidence, but for the purpose of showing that the officers had probable cause for the arrest." This evidence, and that of the dying declaration of the watchman, were subsequently withdrawn from the jury before verdict, leaving no evidence that the watchman was warranted in the arrest, and that in following the prisoner with a dark lantern and an opprobrious outcry, he did it at a disadvantage and at his peril. The prisoner, finding himself pursued by a dangerous enemy, fired the pistol, as he most probably believed, in self-defense. This more pertinently appears in the testimony of prosecuting witnesses that when the prisoner was asked by the watchman who pursued and arrested him, "Why did you shoot me?" answered, "You flashed your lantern on me and I thought it was a gun, and I shot."

The rule of criminal law is settled that an officer without warrant acts as an individual without police authority unless he witnesses the criminal act; and he must have notice that the crime has been committed, and that the prisoner arrested is the guilty party. This was properly laid down by the XI paragraph of the court's instruction :

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"If you find a larceny had been committed, and that Balcom had reasonable ground to believe that the accused was guilty of the offense, he would have authority to arrest the accused until a warrant could be obtained, if within a reasonable time, and if you find the prisoner in such condition purposely killed the deceased to prevent or escape arrest, you must find him guilty of some degree of homicide."

The converse of the proposition must be equally true. If there was but a suspicion without known grounds that a larceny had been committed by the prisoner, the watchman was without authority to pursue and arrest him in the manner related; and the prisoner, upon conviction, from indirect and circumstantial evidence, would not seem to have been guilty in the highest degree of homicide without *malice prepense*.

In accordance with the provisions of an act entitled "An act to provide for the supreme court to reduce the sentence of persons convicted of crime when pending in the supreme court on error, and to allow the court to render such sentence against such person as may be warranted by the evidence," approved March 31, 1887, the sentence of the plaintiff in error is hereby reduced from the term adjudged by the district court to that of twenty years' imprisonment, from the date of his commitment to the penitentiary of this state, which commuted term he is hereby sentenced to serve.

JUDGMENT ACCORDINGLY.

THE other judges concur.

GEORGE M. TRAVER V. BENJAMIN F. SHAEFLE AND
ROBERT M. THOMPSON.

[FILED DECEMBER 18, 1891.]

33	531
42	826
33	531
44	30
33	531
54	280

1. **Evidence: VALUE OF GOODS DELIVERED:** In an action based in part upon the fraudulent representations by the defendant as to the quality and value of goods sold and delivered, *held*, that evidence of the value of goods actually delivered was admissible.
2. —: **PAROL CANNOT CONTRADICT WRITTEN.** A contract in writing having been declared on, and set out at length in the petition, which contained a clause providing that "All of said goods are to be selected by the said G. M. T.," defendant, evidence by parol to the effect that plaintiffs had contracted with G. M. T., defendant, for goods of a different fashion, make, style, and quality, from the goods actually selected by him, *held*, erroneously admitted.
3. —: **MUST AGREE WITH PLEADINGS:** The rule of law is inflexible that the allegations and the proof, *allegata et probata*, must agree.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Webster & Holmes, for plaintiff in error, cited, as to the admissibility of evidence: *Dunbier v. Day*, 12 Neb., 600; *High v. Mich. Bank*, 6 Id., 157; *Cropsey v. Averill*, 8 Id., 158; *Hamilton v. Thrall*, 7 Id., 219; *Clark v. R. Co.*, 5 Id., 322; *Mills v. Miller*, 4 Id., 444; *Delamater v. Chap- pel*, 48 Md., 251; *Knoblauch v. Kronschnabel*, 18 Minn., 307.

Pound & Burr, *contra*, cited: *Little v. Woodworth*, 8 Neb., 281; *Patrick v. Leach*, Id., 530; *Mayer v. Dean*, 115 N. Y., 556; *Briggs v. Hilton*, 99 Id., 517; *Chapin v. Dobson*, 78 Id., 75; *Hall v. Erwin*, 66 Id., 649; *Mead v. Bunn*, 32 Id., 275.

COBB, CH. J.

The plaintiffs below, on June 4, 1888, commenced this action in the district court of Lancaster county, alleging that on February 25, 1888, they entered into a contract with the defendant, as party of the first part, stating that he had sold to them goods, wares, and merchandise of certain quality, kinds, and amounts, mentioned in an inventory and Exhibit A at a cost of \$13,768, to be furnished by the plaintiffs at the marked price and all to be selected by the defendant. The plaintiffs were to pay for cooperage and cartage on the goods, delivered at defendant's store in Lincoln, and to pay for all as follows: \$5,000 in cash down, and \$8,768 by the transfer of the following real estate: Lots 15 and 16 in block A, in Davidson's and Culver's addition to the town of Milford, in Seward county; also lot 3 in block 1 in Milford; also 640 acres of land in Cheyenne county, Nebraska, located sixteen miles south of Kimball, being the same sold to the plaintiff Schaeffle by the Union Pacific Railroad Company; also twelve lots in the city of Hastings, block 22 in Loman's addition to said city; all of which the parties agreed to transfer, or cause to be transferred, to the defendant, free of all incumbrance whatever, except that of \$672 on the land in Cheyenne county, \$1,000 on the block of lots in Hastings, the interest on the same to be paid to the date of contract. The goods to be selected and delivered by defendant on or before February 27, 1888.

The following is a copy of the agreement herein referred to and of exhibit "A" thereto attached:

"Memorandum of agreement made and entered into this 23d day of February, 1888, by and between Geo. M. Traver, party of the first part, and B. F. Schaeffle and R. M. Thompson, of Sutton, Nebraska, parties of the second part, witnesseth: The said party of the first part has this day bargained and sold to the said parties of the second

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part, goods, wares, and merchandise of the quality, kinds, and of the amounts as is fully shown by annexed inventory hereto attached, marked exhibit 'A' and made a part hereof, the aggregate and total cost thereof being the sum of thirteen thousand and seven hundred and sixty-eight dollars (\$13,768.00), as also fully appears on the exhibit 'A.' Said goods to be furnished to said parties at the marked price thereof; all of said goods are to be selected by the said Geo. M. Traver. The said parties of the second part are to pay for all boxes and the cost of drayage. Said goods to be delivered at the store of Geo. M. Traver, in Lincoln, Nebraska. In payment of said amount and the cost of said goods, said parties of the second part hereby agree and bind themselves herein to make payment for the same as follows, to-wit: Five thousand dollars cash in hand at the date of this contract, and the balance of said amount to be paid, to-wit: The sum of \$6,768.00 in the transfer and conveyance of the following described real estate by the parties of the second part to the said Geo. M. Traver. [Here follows the description of several parcels of real property.] That said goods are to be selected and delivered by the said Geo. M. Traver on or before the 27th day of February, 1888. All former contracts heretofore made by the parties hereto are hereby revoked and any suits at law now commenced by the said Traver shall be dismissed at once. In testimony whereof the said parties have hereunto set their hands this 25th day of February, 1888."

Signed and witnessed.

"EXHIBIT 'A.'"

Ginghams	\$100 00
Light brown muslin.....	100 00
Pillow case cotton and sheeting.....	50 00
Prints	100 00
Overalls, jumpers, coats	100 00
Cloaks and jerseys	567 25
Underwear	400 00

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Table oil cloth.....	\$5 70
Fans	125 00
Scarfs, jackets, hoods, leggins, etc.....	200 00
Cottonades.....	98 60
Cassimeres and jeans.....	300 00
Oil clothing and oil hats.....	251 85
Pipes	175 00
White goods department	400 00
Window curtains.....	175 50
Skirts.....	76 77
Velvets, brocades, farmers' satin and velveteen,	600 00
Hosiery	300 00
Gloves	600 00
Laces	200 00
Embroideries and allover	200 00
Wallets and purses.....	100 00
Ladies' neckwear.....	100 00
Dress and cloak trimmings.....	300 00
Silks, satins, and surahs	600 00
Soaps	100 00
Jewelry	200 00
Brushes	100 00
Linens	150 00
Tabling and napkins	150 00
Draperies.. ..	100 00
Flannels	1,000 00
Dress goods, suitings, and cloakings	1,500 00
White and colored cotton flannels	150 00
Shawls.....	800 00
Table spreads	56 40
Buttons	1,097 88
Linings and facings	300 00
Notions and sundries	500 00
Bibs	100 00
Gents' neckwear	300 00
Ladies' and gents' handkerchiefs	300 00

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Ribbons.....	\$400 00
S. M. needles	28 05
Childrens' cotton cloakings, crashes, warp, duck, drills, shirt fronts, veilings, shoe blackening, corsets, silk mitts and mufflers, to amount of.....	200 00
	<hr/>
	\$13,768 00

"If this bill is not in all respects just as the trade was made notify us at once, as no change of terms or prices will be allowed at time of settlement.

(On the margin:)

"The foregoing inventory is the one referred to in said contract and hereby affirmed by us."

Signed by the plaintiffs.

The plaintiffs allege that they paid the defendant the sum of \$5,000 cash, and fully complied with all the terms of their agreement, but that the defendant refused to deliver any of said goods, wares, and merchandise until the 16th day of March following.

2. The plaintiffs allege that on March 16, 1888, the defendant falsely, fraudulently, and knowingly represented that all and every of said goods were new goods, full pieces, and out of his regular wholesale stock, at his regular marked price, and none were out of remnants from his old "Trade Palace Stock," but were suitable for retail trade.

3. Relying on these representations, the plaintiffs made the exchange, upon the terms stated, and fully completed their agreement.

4. At the said 16th day of March the said goods, wares, and merchandise were not new goods, full pieces, nor out of his regular wholesale stock, nor invoiced at his regular marked prices, and were of his old "Trade Palace Stock," and were not suitable for a retail stock, and were of little or no value whatever, and the whole was not worth to ex-

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ceed \$2,000, all of which the defendant well knew; and as a condition of delivery, drew up and compelled the plaintiffs to sign the following:

"LINCOLN, Neb., March 16, 1888.

"In consideration of the acceptance of the bond tendered by B. F. Shaeffe and R. M. Thompson, of Sutton, Nebraska, signed by Morey and McNaul, wherein it is covenanted and agreed to correct certain defects in the assignment of certain land located in Cheyenne county, Nebraska, and deliver the same to Geo. M. Traver, of Lincoln, or in case of failure herein to pay to said Traver the sum of \$6 per acre therefor, and giving the said Shaeffe and Thompson sixty days in which to perform said contract, it is expressly stipulated and agreed by the said Shaeffe and Thompson that all demands of any nature whatsoever now existing against the said Traver, if any, are hereby waived, receipted for, and settled in full, and that the goods sold by the said Traver, in consideration of the conveyance of the land in Cheyenne county, Neb., as stipulated in said bond and contract for the sale thereof, are hereby accepted as in accordance with the terms of said sale, and any and all defects, if any, are hereby waived, and all claims for damages, or of any nature, are hereby cancelled and receipted for, and said goods are hereby receipted for as delivered by the said Traver this day, and as being strictly in accordance with the terms and conditions of the contract."

The plaintiffs allege that, to induce them to sign the foregoing paper, the defendant made the fraudulent representations stated, and, believing them to be true, they signed the same and caused the goods, which had been boxed up by defendant, to be shipped to Sutton, Nebraska, where for the first time said frauds were discovered by plaintiffs.

5. That the whole amount of goods delivered were not worth to exceed \$2,000, for which they had paid \$13,768 in

cash, and exchange of all of said real estate, and they pray judgment for \$11,768, with interest from March 16, 1888.

The defendant answered, denying each and every allegation of the plaintiffs.

2. On February 23, 1888, they had a certain transaction of barter, the terms of which are set forth in the plaintiffs' petition, and the invoice, and exhibit "A." During the four days defendant was engaged in selecting and packing the goods, the plaintiffs were during nearly all of the time present, assisting and assenting to the selections made, and prior thereto had been engaged in the examination of defendant's stock and were made acquainted with his price mark, and had examined into the prices of such goods, both before the making of the contract and during the selection of the goods. The contract was not consummated on the 27th of February, 1888, for the reason that the plaintiffs' title to the real estate was imperfect and incomplete; and afterwards, on March 16, they furnished defendant assurances for obtaining the title they were to convey to defendant, and the goods were then delivered to plaintiffs, and they receipted therefor, and made no complaint on that account. And defendant denies that he made, in respect to the sale of the goods, any other or different contract of sale than the barter heretofore set out, or that he has withheld any of said goods, or failed to furnish or deliver the same so bartered, or that they were of no more value than \$2,000, and avers that he has kept and performed his said contract in all respects.

3. The defendant says that on March 16, having had dealings and barter with the plaintiffs, who, being unable to perform their part of said contract to make such conveyances as they had agreed to make, by reason of certain defects of title, which were supposed to be curable, asked for, and obtained, an extension of time in which to perform their contract, and then had a complete settlement of their mutual dealings, whereby they released and satisfied all

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prior claims against defendant, if any they had, and the defendant then and there delivered to the plaintiffs the goods so sold, selected, and packed up in boxes, which were received by them before the execution of said contract, marked exhibit "B."

4. The defendant says that the plaintiffs are not the real parties in interest in this controversy; that they acted on behalf of their concealed principals, Thompson and Schwab, a copartnership firm at Sutton, Nebraska, who furnished all the property and money which constituted the consideration of said barter, and to whom, if to any one, the damage in this alleged action accrued, and not to the plaintiffs.

The plaintiffs replied, denying every allegation of the answer, except such as are hereinafter particularly admitted; that they did, on February 23, 1888, have a certain barter and sale, according to the terms of a written agreement of that date except as to description of property following the words "in Seward county, Nebraska," also lot No. 3, in block No. 1, in Milford, Seward county, Nebraska; and they deny that at that time, and as a part of the same transaction, there was annexed to said contract a certain exhibit therein referred to, and allege that defendant only made, executed and delivered to the plaintiffs a memorandum of agreement of said date, and like words as plead in said answer, signed in type writing, except some corrections made in ink by the hand of his attorney, E. P. Holmes, and no exhibit was given to plaintiffs nor attached thereto, and they say that the next day after the date of the contract plaintiffs paid to defendant \$5,000 in cash, and all of said goods were boxed up ready for delivery, yet the defendant, in order to cheat, swindle, and defraud the plaintiffs, and to keep control and possession of said goods, in the absence of plaintiffs, to alter, change, and raise the price marks thereon, and to substitute large lots of worthless goods for those paid for by plaintiffs on February 24, 1888, withheld said exhibit "A," and only made

technical objections to said assignments of real property and the titles to said lots and lands, to carry out and assist him in keeping possession of said goods for thirty days or more after plaintiffs had paid him said \$5,000.

The plaintiffs were at all times ready to perform their contract, except as to certain very technical points as to the assignments on the back of the contract for said lands, which the defendant demanded should be corrected; and at his request longer time, until March 16, 1888, was had, and no settlement was had or thought of save on the part of defendant, who caused said release and satisfaction of all and every claim and demand to be made, and plaintiffs signed the same before they had any opportunity to examine the goods in the store and possession of defendant since the payment of said \$5,000, and the exhibit "B" was delivered to defendant long before plaintiffs saw or accepted the goods, or had discovered the fraud set forth in their petition, and that it was a part of the scheme of defendant to obtain from them this exhibit "B," in order to better cover up said frauds and wrongs against them.

There was a trial to a jury, with verdict for the plaintiffs for \$2,500. The defendant's motion for a new trial being overruled, judgment was entered on the verdict.

The case comes to this court upon petition in error, in which eight errors are assigned, to-wit:

1. Under the issues joined the court admitted evidence tending to show the value of the goods delivered by plaintiff herein to defendants to be given to the jury, to which the defendant at the time objected and excepted.

2. That the court permitted evidence of the oral representations, statements, and negotiations, antecedent to the contract of the plaintiff herein to the defendants, to be given to the jury, to vary a contract in writing of February 25, 1888, to which the plaintiff herein at the time objected and excepted.

3. The court permitted evidence to be given to the jury

of what goods were ordered, or ordered to be selected, under the contract by defendants herein, to which the plaintiff herein at the time objected and excepted.

4. The court erred in giving the instructions requested by defendants herein, Nos. 2, 4, and 7, to the giving of each of which the plaintiff herein objected and excepted at the time.

5. The court erred in giving to the jury each of the instructions given by the court, numbered respectively 5, 6, 8, and 11, to the giving of each of which the plaintiff herein objected and excepted.

6. The court erred in refusing to give to the jury each and every of the several instructions requested by the plaintiff herein to be given to the jury on his behalf, and numbered respectively 1, 2, 3, 4, 5, and 6, to the refusing to give each of which instructions severally the plaintiff herein at the time objected and excepted.

7. The court erred in overruling a motion for a new trial.

8. The verdict is not sustained by the evidence, the damages were excessive, and given under influence of passion or prejudice.

The first error assigned, which is also the first discussed by plaintiff in error in the brief, is, that the court admitted evidence tending to show the value of the goods delivered by the plaintiff in error to the defendants in error to be given to the jury. While the petition presents the case of the plaintiffs in a somewhat involved manner, difficult to be understood, we must take it to be an action for fraud and deceit in the sale of goods by the defendant to the plaintiffs, by which the plaintiffs claim to have been damaged in that, by the fraud and deceit of the defendant, he delivered to them and they received goods of an inferior quality and less value than those which he sold to them, and which, by virtue of the contract of sale and the consideration paid, they were entitled to receive. If this is a

fair construction of the object of the action, and the general nature and character of the petition, it follows that the quality and value of the goods actually received is a pertinent and necessary question for the consideration of the jury, without which no intelligent verdict could have been arrived at by them.

"In case of fraudulent representations of the quality or quantity of property sold, the general rule of damages is the difference between the value of the property as it is and what it would be worth if the representations had been true. This being the rule of damages, not only the representations of quality made by the vendor but also the actual value of the property must be given in evidence to the jury to enable them to apply the rule." See Field on Damages, section 706, and authorities there cited.

The second error presented in the petition in error, which is also considered under the first head in the brief of plaintiff in error, is, that the court erred in permitting oral representations, statements, and negotiations, antecedent to the contract of the plaintiff herein to the defendants, to be given to the jury, as counsel add, to vary a contract in writing of February 25, 1888. It is true, as may be seen by reference to the statement, that there was a written contract entered into between the plaintiffs and the defendant of the date stated in the exceptions, yet the alleged fraud and deceit relates to the making and procuring of said contract by the defendant and from the plaintiffs, as well as in the execution thereof.

I am somewhat at a loss to ascertain the true application of the evidence to this assignment as intended by counsel who write the brief. They do not designate in what part of the record this evidence is to be found, nor the witness who gave it; and when it is borne in mind that the bill of exceptions contains 319 pages, I trust that I may be pardoned if I overlook or fail to find some portion of it.

The plaintiff B. F. Shaeffle, the first witness called by

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the plaintiffs, being on the stand, was questioned as to the agreement of February 25; the delivery of the goods by the defendant; the payment of the sum of \$5,000 by the plaintiffs; the shipping of the goods and other matters; in regard to the packing of the goods; where the goods were at that time; to what extent an inspection and examination of the goods was made by the plaintiffs; where the parties were when the contract was made; when and where the goods were packed; the situation, depth, and dimensions of the defendant's store. None of these questions were objected to by counsel for defendant, except as to the depth of defendant's store and as to how many of the goods witness saw selected and packed into the boxes. This latter question was objected to as incompetent, immaterial, and irrelevant, and also objected to by the senior counsel for the defendant—"If the question goes to the value, it is irrelevant, and immaterial under the issues joined, and no foundation laid or the competency of the witness shown," which objection was overruled and defendant excepted. Again, counsel objected to the question put to this witness by counsel for plaintiff: "Q. Did you see the goods they were putting in over ten or twelve boxes?" And again, "Do you know whether he (Thompson) was present when any of the other boxes were packed?" And again, counsel for the defendant objected to the question put to witness, "Who were they (the boxes of goods) addressed to?"

There were a great many other questions asked of this witness which were objected to and the objection overruled by the court, but I fail to find any which in my judgment come within the description of antecedent, oral negotiations of the parties leading to the contract.

R. M. Thompson, the other defendant, was also sworn and examined as a witness on behalf of the plaintiffs, but I fail to find, in his examination in chief, any question put to him by counsel for the plaintiffs which I conceive to

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fall within the said description. But I may be pardoned for saying that as soon as this witness was passed over to counsel for defendant, his examination became such as to render it open to the objection named, but as the plaintiffs are not complaining, no notice can be taken of this.

The plaintiff, B. F. Schaeffe, being on the stand as a witness on behalf of the plaintiffs, and having been examined at considerable length as to the kind and quality of the goods taken out of the boxes after they were shipped to Sutton, his examination was continued as follows:

88. "What kind of buttons were they in these boxes?"

A. "Six hundred and seventy-two gross of one kind of buttons. It is a very cheap button and not very durable. They are worth"—Webster, "I object." Burr, "I will ask him a question."

89. "Were you acquainted with the cash value of buttons at that time?" A. "Yes."

90. "State what these buttons were worth upon the market at that time?" Webster, "I object. Immaterial and irrelevant under the issues. There being no attempt made to show that they were not selected by Traver at the marked price of his stock, and if they were, the value is immaterial." Overruled, etc. A. "They were worth, such a lot as that, taking them all together, six hundred and seventy-two gross, would sell for about seven cents a gross."

91. "What were they charged to you at in this bill?"

A. "If my memory serves me right, I think thirty-five cents, but you will find it in the inventory."

92. "State what kind of buttons you ordered of Mr. Traver?" A. "I bargained for an assortment of buttons." Holmes, "I object, as immaterial under the issues. The pleadings show that Mr. Traver was to select these goods, and to select the buttons, it not being specified what kind of buttons were to be selected." Overruled, etc. A. "O, not more than four or five gross of a kind, and they were buttons that were in style and salable, and that were good

value at the prices he quoted to us at the time we made the contract."

93. "What kind of buttons did he show you at the time you made the contract?" A. "He showed us these buttons—just specimens on his shelves in open sight—fairly in sight to be seen, but buttons he gave us I never saw before, and consequently he didn't give us the buttons we ordered."

94. "How many classes and styles did you examine in his presence?" A. "I didn't count them, but probably two hundred or two hundred and fifty different kinds."

95. "What kind of buttons did you receive?" A. "I got one lot of buttons, six hundred and seventy-two gross of that one kind and quality, and outside of that I received a lot of high-priced buttons that were entirely out of style and not salable. Some were as high as a dollar and a half a dozen, and some were as high as two dollars a dozen," etc.

96. "Look at that inventory—you take the items called gingham and go through that, and tell what kind of gingham you ordered, and what kind you received?" Holmes, "I object, as incompetent and immaterial under the issues. The contract as plead here shows that Mr. Traver had a right to select these goods, and no particular nor special kind were ordered." Overruled. A. "The gingham, as far as this invoice shows, are all right, with the exception of a great many remnants in the line of French gingham, and he charged us fifteen cents a yard for them."

97. "What was said, or what was agreed between Traver and you about remnants—what were the statements made by him to you?" A. "The statements were these, that he was to give us"—Holmes objected, as irrelevant, immaterial, and incompetent. Overruled and answer continued—"goods out of his wholesale stock, and it stands to reason that there would not be any remnants in a whole-

sale stock, and they were to be new goods given us, and there were probably all the remnants he had in the house."

A decision of the questions presented in the above objections to testimony and rulings of the court thereon will probably be decisive of the case.

The petition, instead of alleging the amount, value, kind, and quality of the goods purchased, the direct terms, refers to the agreement in writing between the plaintiffs and defendant on the 23d day of February, 1888. The written agreement refers to the annexed inventory "marked exhibit 'A' and made a part hereof." Looking at the contract and the inventory together, the natural and irresistible inference would be that the goods included therein consisted of aggregated and clearly defined and designated blocks of goods already set apart and well known to the parties, were it not for the clause of the contract, that "All of said goods are to be selected by the said Geo. M. Traver." But giving these words their due meaning and weight, it becomes apparent, and the conclusion follows, that some larger stock or body of goods, embracing goods of the kinds and descriptions named in the inventory, was in the view of the parties in entering into the said contract, out of which the goods contracted for were to be selected by the seller, Traver. The first clause of the contract speaks of the "quality, kinds, and the amounts of the goods as fully shown by the annexed inventory," but when we turn to the inventory, we fail to find anything whatever as to the quality of the goods. For example, the two articles of "ginghams" and "buttons," about which the evidence above quoted was given. These articles are distinguished from other goods only by the use of the most general words. What was the purpose of this so-called inventory? Doubtless it was to limit and control Traver in the selection of the thirteen thousand seven hundred and sixty-eight dollars' worth of goods. Otherwise the entire purchase might, within the letter of the contract, have con-

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sisted of buttons. But the question is, having by the words of the contract, including, of course, the inventory, limited Traver in the selection of the goods to "Buttons, \$1,097.88," and "Ginghams, \$100," with no other words signifying kind, quality, pattern, make, size, or material, can the plaintiffs now by parol limit him to the selection of a varied stock of buttons, and to a hundred dollars' worth of ginghams consisting of entire bolts? This cannot be done without importing words and sentences into the written contract. But if this could be done, surely it would have to be by appropriate allegations of pleading. Here there is no attempt to declare on the contract by its legal effect, nor to construe it by the light of antecedent or contemporaneous facts or circumstances, and the words of the contract, as declared and exhibited, place no limitation of quality, style, or fashion upon the articles of goods to be selected.

There is no allegation in the petition that the plaintiffs ordered goods of the defendant; nor of any contractual or other relations between the parties giving them the right to choose, select, or order particular goods, nor a particular quality, make, style, or fashion of goods, and by such choice, selection, or order, make it the duty of the defendant to deliver such goods or articles.

I am therefore of the opinion that the court erred in overruling the defendant's objections and admitting testimony as to the kind and quality of buttons and ginghams ordered by the plaintiffs of the defendant, etc. These exceptions are a fair sample of those running throughout the record of the case. They are not only of the class of prejudicial errors, but clearly indicate that both the pleadings and trial of the case proceeded upon a false theory. The evidence contained in the record tends to prove, more or less definitely, that the defendant had been for a number of years carrying on a wholesale and retail dry goods business; that he had on hand in his store a large stock of dry

goods and notions, part of which consisted of bright, fresh, fashionable, and stylish goods, suitable for the wholesale trade, and part of which were old-fashioned, shelf-worn, and soiled remnants and broken packages. That he so arranged these goods in the several departments and upon the shelves of his store that a person making an ordinary examination and inspection of the stock would see only the best and desirable goods, the uncut bolts and the entire and unsoiled packages. That the cut bolts, remnants, old style and antiquated pieces, broken and soiled packages, and unsalable goods were covered up and concealed from view. That the best and exhibited goods were marked with a private sale mark, at fair and reasonable prices, respectively; that having by a tempting advertisement induced the plaintiffs to visit his store with the view of making a large purchase of goods, paying therefor partly in cash and partly in real property, as invited by the said advertisement, he took them through his store, calling their attention and giving them time and opportunity only to examine and inspect the fresh goods, uncut bolts, and unbroken and unsoiled packages, calling their attention to the marked sale prices of these and giving them the key to the private mark; that by the above means, and after several hitches in the negotiations, the defendant induced the plaintiffs to enter into and to execute the contract set out in the statement; that thereupon, taking advantage of the clause of the contract providing that the goods should be selected by him, the defendant selected, boxed, and shipped to the plaintiffs, or to their order, goods of the nominal or marked value stated in the contract, in great part out of the old style, unfashionable goods, remnants, and broken and soiled packages, which, though doubtless in the store at the time of the inspection of the stock by the plaintiffs, had not been seen nor examined by them, but had been concealed from them, and most of the articles had been marked far above their value

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and far above the rate at which the superior goods examined by plaintiffs of the same general class were marked.

Had there been allegations of pleading in the plaintiffs' petition sufficient to make this evidence admissible, I think a case for judgment would be made on the part of the plaintiffs against the defendant; but there is no more inflexible rule of law than that, to sustain a verdict or judgment, the pleadings and the proof, *allegata et probata*, must agree.

As there must be a new trial it is not deemed necessary to pass upon the other errors assigned. The judgment of the district court is reversed and the cause remanded to that court for further proceedings, with permission of the plaintiffs to amend their petition, if so advised.

JUDGMENT ACCORDINGLY.

THE other judges concur.

EDGAR L. HOLYOKE, APPELLANT, v. JAMES H. MCMURTRY ET AL., APPELLEES.

[FILED DECEMBER 18, 1891.]

The pleadings and evidence considered, and *held* to sustain the judgment.

APPEAL from the district court for Lancaster county.
Heard below before FIELD, J.

Thomas C. Munger, for appellant.

J. R. Webster, *contra*.

COBB, CH. J.

The plaintiff, by his petition in the court below, alleged that about the 3d day of April, 1888, and before that time, he was the owner and possessor of thirty-three shares of the capital stock of the Lancaster County Abstract Company, a corporation duly organized under the laws of this state, and doing business at Lincoln in said state, of which the plaintiff and the defendants Carrothers & McMurtry were at that time stockholders, and of which the plaintiff is and was the vice president, defendant Carrothers the secretary, and the defendant McMurtry the president. That on or about the said date the plaintiff, at the instance and request of the defendant Carrothers, sold the thirty-three shares said of stock held by him to the defendant Carrothers for the named consideration of \$1,200, and for the purpose of securing the payment of the consideration (no cash being paid or other consideration being passed), the said defendant Carrothers made, executed, and delivered to the plaintiff his promissory note in writing for the sum of \$1,200, payable one year from date, with interest at ten per cent, and at the same time, for the purpose of securing the payment of said promissory note for the purchase money, executed and delivered a chattel mortgage, a copy of which is set out as an exhibit, whereby he assigned to the plaintiff the undivided two-thirds interest in and to a set of abstract books operated by the said Lancaster County Abstract Company, said undivided two-thirds consisting of sixty-six shares of the capital stock of said Lancaster County Abstract Company and the undivided two-thirds interest in the books, plats, papers, and office furniture; and in said mortgage was the proviso that "this mortgage shall be subject to a mortgage given this day to J. H. McMurtry for the sum of \$1,300; that the defendant McMurtry well knew of the existence and terms of the said mortgage to the plaintiff of the sixty-six shares of stock

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and effects of said company by defendant Carrothers to plaintiff, and had actual knowledge of the instrument aforesaid, and of its tenor and conditions at the time of the execution and delivery thereafter; that the said instrument was also duly filed for record in the office of the county clerk of Lancaster county on the 4th day of February, 1888.

That thereafter, and on or about the month of October, 1888, the defendant McMurtry, well knowing of the existence and terms of the assignment and mortgage of the said Carrothers to the plaintiff as aforesaid, took a new instrument of assignment by defendant Carrothers to defendant McMurtry, by the execution of a chattel mortgage by defendant Carrothers to defendant McMurtry, to secure the sum of eighteen hundred dollars as evidenced by a promissory note of Carrothers, dated October 3, 1889, with interest at 10 per cent, and which said chattel mortgage was upon "the undivided two-thirds interest in and to the set of abstract books operated by the Lancaster Abstract Company, said interest consisting of sixty-six shares of the capital stock of said company." About the same time the defendant McMurtry received from the defendant Carrothers, well knowing of plaintiff's claim, the said written assignment of the said sixty-six shares of stock, and the sixty-six shares of stock were delivered into defendant McMurtry's possession, also collateral security for the payment of said note of \$1,800, as above stated, which chattel mortgage and hypothecation of stock were in lieu of, and included, the original indebtedness of thirteen hundred dollars referred to in exhibit "A," the additional five hundred dollars being an additional claim in a separate account, and the defendant McMurtry accepted the new security as a merger of his former claim.

That the assignment by defendant Carrothers to plaintiff was and is a first assignment in fact and form, subject

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only to the original claim of defendant McMurtry for thirteen hundred dollars as above stated, according to the terms and conditions of such first claim of defendant McMurtry.

That the defendant McMurtry, well knowing of plaintiff's rights and claims, has no right or claim in the said stock except as this excepted prior to this plaintiff's rights, and that the chattel mortgage and hypothecation of stock as collateral by defendant Carrothers to defendant McMurtry in October, 1888, after the defendant McMurtry well knew of the plaintiff's rights and claims as aforesaid, and all subject to and inferior to plaintiff's claims.

That the defendant Carrothers is wholly insolvent and he resides without the state, and plaintiff is in great danger of losing his rights, interest, and equity in said sixty-six shares of stock and his entire debt, because the defendant McMurtry is about to assign his interest in the said shares and transfer the same to an innocent purchaser, so that the plaintiff would lose his remedy against the said defendant.

That the State National Bank has, or claims to have, some interest and lien upon the said shares of stock, but what interest the plaintiff is uninformed, and therefore denies the same, and if it has any such interest alleges that it is subject and inferior to the plaintiff's, etc. With prayer for an accounting, and that the interest of the parties in the shares of stock may be determined and decreed by the court, that the plaintiff's interest in said stock might be decreed, and said stock sold subject only to the defendant McMurtry's claim of \$1,300, and for an injunction, etc.

The defendant McMurtry answered said petition, in which he denied that the said plaintiff, at the time of the commencement of said action, or at any time since the 3d day of February, 1888, is or has been the vice president of said Lancaster County Abstract Company. 2. Denying that said defendant Carrothers, on said 3d day of February, 1888, or at any time, did or could by chattel mortgage as-

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sign or encumber the abstract books or other property of said corporation, for that said books were the property of the corporation, and not of said Carrothers, and that by the articles of said corporation it was provided that "At no time shall said company hypothecate its property or in any way encumber the same."

The said defendant further denies that he at any time knew of the alleged attempt of the said Carrothers to mortgage the property of said incorporation, or of his interest therein, or of the stock or the interest in stock, to the said plaintiff.

Further, that in and by the articles of incorporation of the said Lancaster County Abstract Company it is expressly provided that no assignment or transfer of stock shall be valid except by transfer upon the books of the company. That on the 2d day of October, 1888, the said Carrothers, being then indebted to said defendant for the sum of \$1,300, and interest thereon amounting to about \$100, and being also indebted to the defendant upon an account of money loaned and advanced by said defendant to him, and in consideration of the further sum of \$500 then by the defendant advanced and loaned to him, made to said defendant his promissory note of that date, and thereby promised to pay said defendant the sum of \$1,800 in one year thereafter, with interest thereon at the rate of ten per cent per annum, which said indebtedness the said Carrothers secured by hypothecation and pledge to defendant of his sixty-six shares of said incorporation, and defendant denies that said sixty-six shares of stock, or any of them, had theretofore been pledged to the said plaintiff, and avers that he took and received the same of the said Carrothers in good faith, and supposing and believing that said Carrothers was owner of the same as upon the face of said certificates, and upon the record of said corporation, he appeared to be, and defendant satisfied and discharged all and every of his former claims against said Carrothers, and

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made the said further loan of money, and took the said note of \$1,800 payable in one year after said transaction, and received said sixty-six shares of stock as security therefor in full faith and belief that said Carrothers was the owner in his own right, as well as the holder of said sixty-six shares of stock in said corporation, and that said debt is yet in every part unpaid, and defendant claims and has lien upon said stock for said sum and interest. With prayer for judgment, and that plaintiff's action be dismissed, etc.

For a reply the plaintiff denied that the articles of incorporation of the Lancaster County Abstract Company provides, as stated in articles 5 and 6 quoted in the defendant McMurtry's answer, and alleged that articles 5 and 6 provide as follows:

"Art. 5. The affairs of this corporation shall be conducted by a board of directors, consisting of not less than three nor more than five members, who shall be stockholders, and shall be elected at the annual meeting of stockholders by a majority vote of stock present or represented at such meeting by proxy in writing, and who shall hold their offices until others are duly elected in their stead. Two-thirds of such elected directors shall constitute a quorum of the board. Such annual meetings shall be held at —, on the first Tuesday in January, 1888, and on the 1st of January each succeeding year thereafter, at their usual place of business in the city of Lincoln, Nebraska, and until the date of such first meeting the directors shall be J. H. McMurtry, C. C. Carrothers, and E. L. Holyoke.

"Art. 6. The officers of this company shall consist of president, vice president, secretary and treasurer, who shall be elected by the board of directors from their own members at their annual meeting on the same day and date and at the same place as the annual meeting of said stockholders for the election of directors, and such officers shall hold their offices until their successors are duly elected.

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The duties of such officers not otherwise fixed shall be defined by by-laws adopted by the board of directors, and until such first election the officers shall be J. H. McMurtry, president; E. L. Holyoke, vice president; and C. C. Carrothers, secretary and treasurer."

Plaintiff denied that on the said 3d day of February, 1888, by the sale and assignment of his stock to said Carrothers, his office as vice president became vacant and himself ineligible to hold said office, but alleged himself to be vice president as set forth in his petition, and that there was no election held for officers of said company up to the time of filing said petition and to the 3d day of October, 1888.

In reply to the second paragraph of defendant's answer, plaintiff alleged that the defendant Carrothers, by the instrument set out in plaintiff's petition marked "exhibit A," did encumber his interest in the property of said corporation and in his sixty-six shares of stock as therein stated.

In reply to the third paragraph of defendant McMurtry's answer, plaintiff made replication of the truth of the statement in his petition contained of defendant McMurtry's knowledge of plaintiff's claim and denied that defendant McMurtry was ignorant of the same.

In reply to the fourth paragraph of the answer, denied that the articles of incorporation of the said Lancaster County Abstract Company, either original or amended, at any time prior to the 3d day of October, 1888, or up to this time, provide that no assignment or transfer of stock shall be valid except by transfer upon the books of said company, but alleged that no such provision was or is contained in the said articles.

Plaintiff also alleged that in regard to the additional five hundred dollars advanced, loaned, and paid to defendant Carrothers by defendant McMurtry, and the promissory note given to secure the same, and the \$1,300 originally owing by defendant Carrothers to defendant

McMurtry, and as to the hypothecation and pledge by defendant Carrothers to defendant McMurtry on the 2d day of October, 1888, of defendant Carrothers' sixty-six shares of stock then in Carrothers' possession, and upon plaintiff's claims a lien and equitable mortgage as in the petition stated, that the defendant McMurtry in so taking the hypothecation and pledge of said stock did not act in good faith, but well knowing, actually and constructively, of plaintiff's rights, claims, and liens, as set forth, both as to the five hundred dollars and the thirteen hundred dollars, together making the \$18,000 which said pledge and hypothecation were supposed to secure. Plaintiff admits that, as in his petition alleged, at the time of the giving of this hypothecation and pledge of stock, the defendant McMurtry satisfied and discharged all and every of his former claims against said Carrothers, and took the said note of \$1,800, payable in one year after the transaction, and alleged that thereby and then the defendant McMurtry released his lien (as to the thirteen hundred dollars and interest) in the assignment, chattel mortgage, and equitable mortgage given by the said Carrothers to the said McMurtry on the 2d day of February, 1889, to secure the sum of thirteen hundred dollars and interest, and which assignment and lien and claim upon said stock was excepted in the like assignment lien claim given by defendant Carrothers to plaintiff the same day (a copy of which is attached to the plaintiff's petition, marked exhibit "A"), and by the admission and confession of defendant McMurtry in the fourth paragraph of his answer contained, and now admitted and accepted by this plaintiff, that plaintiff's claim become and was and remains a first and prior lien upon said sixty-six shares of stock, and also the other property and interest mentioned in exhibit and there set forth more fully, becoming such first and prior lien from the time of such release, discharge, and satisfaction. With prayer that plaintiff might be adjudged and decreed to have a good and prior

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and first lien upon and right to hold said sixty-six shares of capital stock, and that the court might order the said defendant to deliver up the said stock to be sold to secure the plaintiff's lien as in his petition set forth, and for the interests of the other parties to this suit to be declared, and for costs against the defendant, and for general relief.

Judgment by default was taken against the defendant Carrothers. The defendant bank neither answered nor was defaulted. The cause was tried to the court without a jury, which made the following findings and entered the following judgment:

"The court, upon consideration, finds that upon February 3, 1888, the plaintiff was the owner of thirty-three shares of the capital stock of the Lancaster County Abstract Company, a corporation duly organized under the laws of Nebraska; that upon that day, February 3, 1888, the plaintiff sold and transferred to the defendant Charles C. Carrothers, for the consideration of \$1,200, due in one year, with interest at the rate of ten per cent, and that to secure said \$1,200 the said Carrothers executed to the plaintiff a chattel mortgage upon sixty-six shares of said stock, being the thirty-three shares purchased from said plaintiff and thirty-three other shares originally owned by said Carrothers; said mortgage was given subject to a mortgage of the same date upon the same shares of stock for the sum of \$1,300, to J. H. McMurtry, defendant herein; said chattel mortgage to plaintiff was duly filed for record, February 4, 1888, in the county clerk's office of Lancaster county; that on October 2, 1888, defendant Carrothers executed a new note to the defendant McMurtry for the sum of \$1,800, being made up of the \$1,300 named in the mortgage to the plaintiff as due to McMurtry, and \$500 further advanced money; that to secure this \$1,800 note the defendant Carrothers, on said October, 2, 1888, duly transferred and assigned to said McMurtry as collateral security the sixty-six shares of stock named in the chattel mortgage to the

plaintiff; that upon October 2, 1888, the defendant McMurtry had knowledge that the plaintiff claimed a one-third interest in the corporation, and had such further knowledge of the affairs of the corporation that he took said sixty-six shares of stock as collateral security subject to all the equities and claims of the plaintiff in and to said stock. The court finds the chattel mortgage upon the stock not such an instrument as to entitle it to record as a chattel mortgage, and that the filing of the same gave no constructive notice of such mortgage to any one.

"The court further finds the chattel mortgage upon the sixty-six shares of stock, from the defendant Carrothers to the plaintiff, a valid instrument and binding between the plaintiff and said defendant Carrothers and all persons having actual knowledge of its existence.

"The court further finds that the defendant, James H. McMurtry, has a first lien upon the sixty-six shares of stock in the said Lancaster County Abstract Company, for the sum of \$1,300, with interest from February 3, 1888, at ten per cent, to-wit, \$1,562. That the plaintiff has a second lien upon said sixty-six shares of stock for the sum of \$1,200 with interest at ten per cent from February 3, 1888, to-wit, \$1,442. It is therefore considered and adjudged by the court that in case the defendant Charles C. Carrothers shall fail for the space of twenty days from the entry of this decree to pay (1) to the defendant James H. McMurtry the said sum of one thousand five hundred and sixty-two dollars, with interest thereon at the rate of ten per cent per annum until paid, and (2) to the plaintiff Edgar L. Holyoke the said sum of one thousand four hundred and forty-two dollars, with interest thereon at the rate of ten per cent per annum from this date until paid, and (3) to the clerk of this court the costs of this action, taxed at \$33.25, that said property, to-wit, sixty-six shares of the capital stock of the Lancaster County Abstract Company, a corporation organized under the laws of this

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state, shall be sold; and an order of sale shall issue to the sheriff of Lancaster county commanding him to sell said shares as upon execution and bring the proceeds thereof into court, to be applied in satisfaction of the sums so found due in the order of their priority as heretofore found and the costs of this action upon the confirmation of said sale.

"And it is further ordered that plaintiff recover from defendant McMurtry the costs of this proceeding, taxed at \$33.25."

The cause comes to this court on appeal. The finding of the court that the defendant McMurtry, at the time of the taking by him of the security, hypothecation, and pledge of the said sixty-six shares of stock from the said defendant Carrothers, for the note of \$1,800 under which he claims the first lien upon said shares, "had knowledge that the plaintiff claimed a one-third interest in the corporation, and had such further knowledge of the affairs of the corporation that he took said sixty-six shares of stock as collateral security subject to all the equities and claims of the plaintiff in and to said stock," relieves this court of the task of examining the evidence, the said finding not being complained of by the defendant. We are also relieved of the otherwise doubtful question presented by the next finding of the district court, "that the chattel mortgage upon the stock is not such an instrument as is entitled to record as a chattel mortgage, and that the filing of the same gave no constructive notice of such mortgage to anyone." Constructive notice is of no importance where the party to be charged therewith has actual knowledge of the fact.

The further finding of the court that the defendant McMurtry has a first lien upon the sixty-six shares of stock for the amount of his first or original debt and interest, is doubtless based upon the pleadings rather than upon the evidence.

The action of the plaintiff appears to have been brought, and his petition framed, upon the theory that the plaintiff

was only entitled to a lien upon the said shares of stock and a two-thirds interest in the books and furniture of the said corporation, subject to the prior lien of the defendant McMurtry upon the said shares of stock and property for the sum of \$1,400. And in his prayer for relief he expressly gave and conceded preference to said McMurtry's claim to that amount. It is true that in his reply the plaintiff claimed, and at considerable length pressed his right, to be preferred to any claim of McMurtry. The case is somewhat embarrassed by the admission of the defendant McMurtry in his answer that on the 2d day of October, 1888, when the said "Carrothers secured by hypothecation and pledge to this defendant of his sixty-six shares of stock, etc., defendant satisfied and discharged all and every of his former claims against the said Carrothers." Aside from this admission it is evident from the pleadings and evidence that the pledge or hypothecation of the date of October 2, 1888, was the first express arrangement between McMurtry and Carrothers for the security of the former upon the shares of stock of the latter, yet it is also quite apparent from the petition, as well as from the chattel mortgage from Carrothers to the plaintiff (a copy of which is attached to the petition as an exhibit), that said mortgage was given by Carrothers with an express reservation of the right of McMurtry to a superior lien upon the same property and shares of stock to the extent and amount of \$1,300 as of that date, and that the plaintiff parted with his property and received his security for payment with full knowledge of, and assent to, such reservation and preference.

Leaving out all consideration of the plaintiff's admissions in the petition, I conclude that the equities of the case are with the defendant, and the mere question of the priority of liens cannot control its decision. The judgment of the district court is

AFFIRMED.

THE other judges concur.

33	500
37	899
33	500
43	497
33	500
53	809
54	161
38	500
60	241

STATE, EX REL. C. W. PROCTOR ET AL., V. E. COTTON.

[FILED DECEMBER 18, 1891.]

1. **Justice of the Peace: CHANGE OF VENUE.** In an action pending before a justice of the peace, a motion for a continuance was filed by the plaintiff, and afterwards a motion supported by affidavits was made by the defendant for a change of venue, with a tender of one dollar for costs. *Held*, That upon the evidence before us it was not clear that the relator had complied with the law on his part so as to entitle him to the change as sought.
2. ——— : ——— : **MANDAMUS.** This court will not by *mandamus* correct the alleged erroneous rulings of other courts, nor harass justices of the peace, or parties having causes pending before them, by reviewing the action of such justices before final judgment, nor will a *mandamus* be granted where there is a plain and adequate remedy at law.

ORIGINAL application for *mandamus*.*Charles O. Whedon*, and *Charles T. Jenkins*, for relator.

No briefs filed.

MAXWELL, J.

This is an application for a *mandamus* to compel the defendant, who is a justice of the peace, to prepare and certify a transcript of his proceedings in the case of *Fred K. Porter v. Charles W. Proctor*, pending before said justice, to another justice of the peace named, an affidavit for a change of venue having been filed by the defendant in that case, and a tender of certain costs then accrued.

It appears that prior to the time set for the trial of the cause the plaintiff in that case filed a motion for a continuance for thirty days; that on the return day the defendant in that case filed an affidavit for a change of venue, and claims that he tendered the proper amount of costs, and it

is alleged that he tendered to the justice the sum of \$1 for the costs of the transcripts.

The justice, in his answer, alleges that the tender of costs was coupled with the condition or demand that he transfer the case to certain justices named, and so far as we can judge from the record such was the case.

Sec. 958a of the Code provides: "That in all civil and criminal proceedings before justices of the peace, any defendant in such proceedings may apply for and obtain a change of venue, by filing an affidavit in the case, made by the defendant, his agent or attorney, stating that the defendant cannot, as affiant verily believes, have a fair and impartial hearing in the case on account of the interest, bias, or prejudice of the justice, and by paying the costs now required to be paid by defendant on change of venue, for the causes and in the cases mentioned in chapter 4 of title 30, part two of the Revised Statutes, and thereupon the proceedings shall be transferred to the nearest justice of the peace, to whom the said objections do not apply, of the same county, to be proceeded with in the manner pointed out for the transfer and procedure in cases on change of venue for cause mentioned in said chapter four.

"Sec. 958b. The application shall be made before entering upon the merits of the case by the introduction and reception of evidence, and no second change of venue shall be allowed for the same cause in the same proceeding."

Under the above sections of the Code it is the duty of the justice, upon the filing of the proper affidavit, to change the venue. The party moving for the change, however, cannot dictate to what justice the cause shall be transferred. He may, however, in his affidavit for a change state any objections to the nearest justice that he may deem to be well founded. The justice, however, must determine from all the evidence before him to whom the cause will be transferred. The object of the change is to secure an impartial

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tribunal, one which will hear the case and decide impartially between the parties.

In the case before us the relator has failed to show a clear right to the relief demanded. It is pretty evident that the justice was somewhat inexperienced and in doubt as to the law upon certain points. He does not seem to have willfully denied the relator any rights. There is an adequate remedy at law for relief in this class of cases.

It was not the intention of the framers of the Code to permit cases of this kind to be brought into the supreme court, and thus harass and annoy not only the justice but the adverse party. The presumption is that a justice of the peace will do his duty, and there must be a very clear dereliction thereof before this court will compel him to act. The record fails to show such dereliction in this case, even if *mandamus* would lie.

Mandamus will not lie. Should this action be sustained, then every erroneous ruling of a court would be sought to be reviewed on *mandamus*, and litigation thus become interminable. In *State v. Smith*, 105 Mo., a case in some of its features similar to this, a *mandamus* was refused.

The district court reviews the action of a justice of the peace, and if either party is dissatisfied with the judgment the case may then be brought into this court for review.

The relator, if he rely on his affidavit for a change of venue, may have the same reviewed on error in the district court. That remedy is plain and adequate and does not delay the trial of the cause. The writ is

DENIED.

THE other judges concur.

STATE OF NEBRASKA V. DANIEL H. WHEELER.

[FILED DECEMBER 18, 1891.]

33	563
51	874
88	568
61	189

Taxation: FOREIGN INSURANCE COMPANIES: CONSTITUTIONAL LAW. Sec. 7, art. 9, of the Constitution prohibits the legislature from imposing taxes on municipal or other corporations or the inhabitants or property thereof, for corporate purposes. *Held*, That the requirements that certain insurance companies should pay a certain amount on the gross receipts to fire companies, etc., was a tax, and therefore in conflict with the constitution.

EXCEPTIONS from the district court for Douglas county. Tried below before HOPEWELL, J.

T. J. Mahoney, for plaintiff in error:

The act of 1889 did not provide for the collection of a tax; it merely prescribed a condition precedent to the transaction of business in Nebraska by foreign insurance companies. (*People v. Thurber*, 13 Ill., 554; *Walker v. Springfield*, 94 Id., 364; *Ill. Mut. Fire Ins. Co. v. Peoria*, 29 Id., 180; *East St. Louis v. Wehrung*, 46 Id., 392; *Ducat v. Chicago*, 48 Id., 172; *Trustees v. Rome*, 93 N. Y., 313.) Even if it be considered a tax, it is not imposed upon a municipality or its inhabitants, but upon foreign corporations. Though the act be broader than its title, yet since the latter clearly shows that the legislature intended the act to apply to foreign insurance companies, it is valid as to them. (*Messenger v. State*, 25 Neb., 676.)

H. C. Brome, contra:

The imposition must be considered either a tax or a license fee. If the former it is unconstitutional, and if the latter it belongs alone to the school fund. The Illinois and New York cases are not in point, because of different

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constitutional provisions in those states. The precise question here presented was settled in *San Francisco v. Liverpool Ins. Co.*, 74 Cal., 113.

MAXWELL, J.

The defendant in error was informed against in the district court of Douglas county under the provisions of chapter 47 of the acts of the legislature of the state of Nebraska of 1889, entitled "An act to require insurance companies, organized under the laws of other states and doing business in Nebraska, to pay a duty or rate for the support of fire companies composing the fire department of any city or village."

The information charges that the defendant on or about the 6th day of July, A. D. 1889, in said county of Douglas, did then and there effect and procure to be effected fire insurance to the amount of \$3,000 by the Phoenix Insurance Co., of Brooklyn, N. Y., upon a dwelling house situated in the city of Omaha, in said county and state, the property of one John T. Hopkins; that said Daniel H. Wheeler then and there received for said fire insurance a premium of \$45, said insurance company being a corporation organized under the laws of the state of New York, said state being a state other than the state of Nebraska, and the said Daniel H. Wheeler then and there being a duly authorized agent of said corporation; the said city of Omaha then and there being a city of the metropolitan class, duly organized under the laws of the state of Nebraska, having an organized fire department with more than twelve active members, one good hose cart, 500 feet of good leather hose kept in an engine house fit and ready at all times for actual service, one hook and ladder company with no less than twelve active members, having a good hook and ladder truck and the necessary men, teams, and equipments so as to constitute an active and properly equipped fire department ready for service at all times;

and the said Daniel H. Wheeler not having then and there executed and delivered to the treasurer of said city of Omaha on the first days of January and July in each year, an account of all premiums received by him during the six months preceding said report, and to pay to said treasurer two per centum of such premiums for the use, support, and benefit of said department, and not having given such bond in any sum whatever.

Upon being arraigned upon this information the defendant pleaded guilty and filed a motion in arrest of judgment, which motion was subsequently sustained and the defendant discharged, to which ruling of the court, sustaining the motion in arrest of judgment and discharging the prisoner, the county attorney excepted, and now brings the case into this court for the determination of the question of law therein involved.

The only question of law involved is the constitutionality of the act of 1889, above referred to. If this act is unconstitutional, the ruling of the district court was correct and should be affirmed, but if the act is constitutional that ruling was erroneous. The several grounds upon which it has been urged that this act is unconstitutional, are:

1st. That the act is broader than its title in this, that the title refers only to insurance companies organized under the laws of other states, while the body of the act appears to relate to all insurance companies.

2d. That the law is repugnant to section 11, article 3, of the constitution, which provides that "no law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed" in this, that the act in question is amendatory of section 38 of the Revenue Act.

3d. That the act in question is in contravention of section 1, article 9, of our constitution, for the reason that it is not uniform as to the class upon which it operates.

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4th. That it is in contravention of section 7, article 9, of the constitution, which prohibits the legislature from imposing taxes upon municipal corporations or the inhabitants or property thereof for corporate purposes.

5th. That it is unconstitutional because it contemplates the collection of a tax by means of a criminal prosecution.

Sec. 7, art. 9, of the constitution is as follows: "Private property shall not be liable to be taken or sold for the payment of the corporate debts of municipal corporations. The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."

It is very evident that the amount levied upon the insurance companies in this case is a tax, and as such is in conflict with the provisions of the constitution.

The judgment is right and is

AFFIRMED.

THE other judges concur.

33	566
139	639
33	566
49	376
33	566
56	503
33	566
459	642

AUGUST MEYER ET AL., APPELLEES, V. CITY OF LINCOLN ET AL., APPELLANTS.

[FILED DECEMBER 18, 1891.]

Adverse Possession: STREETS. When a person has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city, under a claim of right, for ten years, the title thereto vests absolutely in such occupant.

APPEAL from the district court for Lancaster county.
 Heard below before CHAPMAN, J.

E. P. Holmes, for appellants:

No right to obstruct a street can be acquired by ad-

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verse possession. (*Alvord v. Pope*, 53 Cal., 437; *Hoadley v. San Francisco*, 50 Id., 265; *Quincy v. Jones*, 76 Ill., 231; *Sims v. Chattanooga*, 2 Lea [Tenn.], 694; *San Francisco v. Sullivan*, Id., 603; *Jersey City v. Howeth*, 30 N. J. L., 521; *Sheen v. Stothart*, 28 La. Ann., 630; *Cross v. Morristown*, 18 N. J. Eq., 305.) Encroachments upon a public street are public nuisances. (*Wetmore v. Tracy*, 14 Wend. [N. Y.], 250; *Robbins v. Chicago*, 4 Wall. [U. S.], 657; *Nevins v. Peoria*, 41 Ill., 503; *El Dorado v. Davidson*, 30 Cal., 520.) No length of time will legalize a public nuisance. (*Folkes v. Chadd*, 3 Doug. [Eng.], 157; *Stoughton v. Baker*, 4 Mass., 522; *Com. v. Upton*, 6 Gray [Mass.], 476; *Burbank v. Fay*, 65 N. Y., 57; *New Orleans v. U. S.*, 10 Pet. [U. S.], 734; *Henshaw v. Hunting*, 1 Gray, [Mass.], 203; *Com. v. Boston*, 16 Pick. [Mass.], 442; *Wright v. Tukey*, 3 Cush. [Mass.], 290; *Fox v. Hart*, 11 O., 414; *Ellsworth v. Grand Rapids*, 27 Mich., 250; *Gaberling v. Wunnenberg*, 51 Ia., 125.)

Billingsley & Woodward, and *J. E. Philpott*, *contra*, cited cases referred to in opinion, and the following: *Forsyth v. Wheeling*, 19 W. Va., 318; *Gaines v. Hot Springs Co.*, 39 Ark., 262; *Kennebunkport v. Smith*, 22 Me., 445; *Alton v. Ill Trans. Co.*, 12 Ill., 38; *Sch. Directors v. Goergis*, 50 Mo., 194; *Gibson v. Chouteau*, 13 Wall. [U. S.], 92; *Cooper v. Detroit*, 42 Mich., 584; *Lancaster Co. v. Brint-haul*, 29 Pa. St., 38; *Vicksburg v. Marshall*, 59 Miss., 563; *Sims v. Frankfort*, 79 Ind., 486.

NORVAL, J.

This action was brought by August Meyer to enjoin the defendants, the mayor, councilmen, and street commissioner of the city of Lincoln, from opening an alleged public road or street in said city, by cutting down and removing numerous fruit and shade trees owned by the plaintiff, which are claimed by the defendants to be within the lim-

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its of said highway or street and to obstruct the travel thereon. It also appears that Adam Bax, Emma A. Beach, and Margaret Roath each brought a similar action against the defendants herein, which, for convenience, by agreement of parties, were tried with this in the district court, it being stipulated that all the causes should abide the decision in the suit of Meyer against Graham and others.

The trial court found the issues in favor of the plaintiff Meyer, and rendered a decree perpetually enjoining the defendants from entering upon plaintiff's premises, or from injuring or destroying the trees thereon, or anywise interfering with the plaintiff's possession and enjoyment of the same. The defendants appeal.

In 1865 the territorial legislature of Nebraska passed an act entitled, "An act to locate a territorial road from Forest City in Sarpy county, to the south line of Lancaster county." Charles H. Walker, John P. Loder, and Richard Wallingford were named in the law as commissioners to locate the road. By the act the commissioners were required to view and locate the road and make return thereof to the county clerks of the several counties through which the road should pass, on or before the 1st day of August, 1865. (Laws 1865, page 144.)

The commissioners commenced their work in Lancaster county on August 1, 1865, but did not complete the same and make return to the county clerk of the county until the 5th day of September of the same year. A portion of this territorial road was located on the section line between section 35 and 36, in town 10, range 6 east, and is now known as a portion of Fourteenth street in said city. At the date of the location of this road the title to the northeast quarter of said section 35 was in the United States. Subsequently, on the 15th day of January, 1870, the east half of said northeast quarter of section 35 was laid out and platted by the owner as "Dawson's addition to South Lincoln." The plat represents a street on the east side of

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the tract thus platted, and also the east tier of blocks as being the same in size as all other blocks in the addition. The legend recites that all lots are 142 feet deep by 50 feet wide. The plaintiff Meyer is the owner of lot 12, in block 44 of said addition, which lot lies on the east side of the addition and next to the highway or street in controversy. Counting the lot 50 feet in width, the east side thereof is from six to eight feet west of the section line between said sections 35 and 36. The plaintiff's improvements, which were sought to be removed by the defendant Byers as street commissioner, are on the strip which it is claimed was set apart for said street or road. The defendants contend that this street is 100 feet wide, the same as the other streets in the addition. If such is the case the eastern tier of lots are much less than half the width called for in the legend attached to the plat of the addition.

In argument, the plaintiff insists that the territorial road already referred to was never legally located, nor was it ever ordered opened as a public highway, and that the land in dispute is a part of plaintiff's lot, and not within the limits of any street of the city of Lincoln. As we view the case it will not be necessary for us to consider or decide the questions thus presented, but for the purpose of the case will assume that the ground in controversy is within the limits of a legal public street of the city of Lincoln.

The plaintiff alleges in his petition, and there is ample testimony in the record tending to show, that for more than ten years immediately prior to the bringing of the action, the plaintiff and his grantor have been in the open, actual, adverse, peaceable, and continued possession of said premises and held the same under claim of title. The evidence shows that a house, with a cellar under it, a well, barn, smoke-house, fruit and shade trees, and a fence, have been upon the lot since 1878 or the spring of 1879. The house is about twenty feet west of the section line and

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within the strip claimed to be a part of the road or street known as Fourteenth street. The trees were east of the house. The plaintiff and his grantor have paid, from year to year, the taxes levied upon said lot since 1870. Upon the trial there was no attempt to show that the land in controversy had been used or traveled upon by the public as a street for more than ten years, but on the contrary it is clear enough from the evidence that the traveled road was east of the section line. Most of the improvements were made by the plaintiff's grantor, Christian Bohlman, who lived upon the premises for seven or eight years prior to 1885, when he sold the lot to the plaintiff, who immediately took possession and has resided thereon ever since. The possession of the plaintiff and his grantor was not in any manner disputed by anyone, nor did the city authorities make any claim to the land until about the 24th day of July, 1889, when the street commissioner commenced removing the fence and cutting down the trees, whereupon this action was instituted to restrain the city authorities from proceeding to open a street through the premises.

By numerous decisions of this court it has been held that adverse possession of real estate as owner for ten years gives a perfect title to the occupant. (*Horbach v. Miller*, 4 Neb., 47; *Gatling v. Lane*, 17 Id., 79; *Haywood v. Thomas*, Id., 240; *Tex v. Pflug*, 24 Id., 669; *Levy v. Yerga*, 25 Id., 764; *Obernalle v. Edgar*, 28 Id., 70; *Crawford v. Galloway*, 29 Id., 261; *Petersen v. Townsend*, 30 Id., 376; *Alexander v. Wilcox*, Id., 795.)

Appellants contend that no one can acquire title to a street by adverse occupation. In other words, that the doctrine of adverse possession does not apply to municipal corporations. In our investigation of the subject we find the authorities conflicting. The decisions of the highest courts of some of the states, notably California, Pennsylvania, New York, New Jersey, Rhode Island, and Louisiana sustain the doctrine for which the appellants contend, while

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the courts of most of the other states have held that the doctrine of adverse possession applies to municipal corporations, the same as individuals. The weight of the adjudications is certainly that way. (*City of Cincinnati v. First Presbyterian Church*, 8 O., 298; *Same v. Evans*, 5 O. S., 594; *Armstrong v. Dalton*, 4 Dev. L. [N. C.], 568; *Rowan's Ears. v. Town of Portland*, 8 B. Mon. [Ky.], 232; *Dudley v. Trustees of Frankfort*, 12 Id., 610; *City of Galveston v. Menard*, 23 Tex., 349; *County of St. Charles v. Powell*, 22 Mo., 525; *City of Peoria v. Johnston*, 56 Ill., 45; *City of Richmond v. Poe*, 24 Gratt. [Va.], 149; *City of Pella v. Scholte*, 24 Ia., 283; *Fort Smith v. McKibbin*, 41 Ark., 45; *Cornwall v. L. & N. R. Co.*, 87 Ky., 72; *Clements v. Anderson*, 46 Miss., 581; *City of Wheeling v. Campbell*, 12 W. Va., 36; *Webber v. Chapman*, 42 N. H., 326; *Schock v. Falls City*, 31 Neb., 599.)

Dudley v. Trustees of Frankfort, *supra*, was an action to restrain the marshal from removing plaintiff's enclosure off of the street as an obstruction. The plaintiff claimed the right to a part of the street by adverse occupancy. The court in the opinion say: "If the private citizen at any time encroach with his buildings and enclosures upon the public streets, the municipal authorities should, in the exercise of proper vigilance and of their undoubted authority, interfere by the legal means provided in their charter, to prevent such encroachment in due time, and thus preserve for the public use the squares, streets, and alleys of the town in their original dimensions; but if a private individual or citizen has been permitted to remain in the continual adverse, actual possession of public grounds, or of a public street, or of part of a street, as embraced within his inclosure or covered by his dwelling or other buildings, for a period of twenty years or more, without interruption such citizen will be vested thereby with the complete title to the ground actually occupied by him; and the title, thus perfected by time, will be just as available against a municipi-

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pal corporation as it would be against an individual, whose elder title and right of entry may be barred by a continued adverse possession for twenty years of his land."

In *City of Wheeling v. Campbell*, *supra*, that court, after a complete and critical review of the conflicting authorities, in the opinion say: "We see no reason why a municipal corporation should not be held to the same degree of diligence in guarding their streets and squares from encroachments as natural persons are in protecting their property from the adverse possession of others. We do see great reasons why no time should bar the sovereign power, because the officers of the sovereign, whether king or state, have such various and onerous duties to perform, that the rights of the sovereign may be neglected; and all the people of the kingdom or state are interested in having the rights of the sovereign preserved intact, and not subject to be impaired or lost by the neglect of officers. But the same reason does not apply to a municipal corporation. A city or town is a compact community, with its city or town council, its committee on streets and alleys, and its street commissioners, whose special duty it is to see that the streets, squares, and alleys are kept in proper order, and free from obstructions or encroachments. And if with all this machinery and power confined to so narrow a compass, and the interests of the corporation to exercise it, the city authorities permit an individual to encroach upon the streets, alleys, or squares of the city and hold, enjoy, and occupy the same, claiming them as his own under his title, without interruption or disturbance in that right, for the period described in the statute of limitations, the city not only does, but we think, according to reason as well as authority, ought to, lose all right thereto."

Upon a careful consideration of the question we are satisfied, upon principle as well as authority, that adverse possession by an abutting lot owner of a portion of a street in a city for the statutory period of limitations will

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give a complete title thereto to the occupant. To have that effect the possession must be actual, visible, exclusive, and uninterrupted for the full period of ten years, under a claim of right. Under the facts proven the city is barred from now asserting any right or claim to the property held by the plaintiff for ten years. The judgment is

AFFIRMED.

THE other judges concur.

**WILLIAM A. GWYER, APPELLEE, V. MARY SPAULDING,
APPELLANT.**

[FILED DECEMBER 18, 1891.]

1. **DEEDS: MISTAKE: EQUITY WILL GRANT RELIEF** against a mistake in the description of land in a deed, if the mistake is established by clear and satisfactory evidence.
2. **REFORMATION: PARTIES.** A grantee in a deed may maintain an action to reform the deeds in his chain of title.
3. **——: NOT ALLOWED OF VOLUNTARY DEEDS.** A deed that is purely voluntary, resting on no valuable consideration, cannot be reformed for a mistake at the suit of the grantee therein named.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

Mahoney, Minahan & Smyth, for appellant, cited, contending that all matters connected with the mistake must be clearly shown: *Kerr*, Fraud and Mistake [Bump's Ed., 1872], 421, 422, 429, 430, 431, 432; *Lyman v. Ins. Co.*, 17 Johns. [N. Y.], 373; *Farley v. Bryant*, 32 Me., 474; *McDaniels v. Bank*, 29 Vt., 230.

Christofferson & Penwarden, and *William D. McHugh*, *contra*, cited, contending that voluntary deeds could not be reformed: *Brown v. Kennedy*, 33 Beav. [Eng.], 147; *Smith v. Wood*, 12 Wis., 425; *Eaton v. Eaton*, 15 Id., 284; *Petesich v. Hambach*, 48 Id., 447; *Dickinson v. Glenney*, 27 Conn., 109; *Minturn v. Seymour*, 4 John. Ch. [N. Y.], 497; *Colman v. Sarrel*, 1 Ves. Jr. [Eng.], 54; *Lee v. Henley*, 1 Vern. [Eng.], 37; *Acker v. Phœnix*, 4 Paige Ch. [N. Y.], 305; *Quirk v. Thomas*, 6 Mich., 98.

NORVAL, J.

This suit was brought by appellee to reform two deeds, one executed in 1859, by Andrew B. More, as chairman of the board of trustees of Grand View, to Linas Scudder, and the other executed in 1886 by the heirs of said Linas Scudder to appellee, so as to make the descriptions in said deed read lot 20 in block 447 in Grand View, instead of lot 2 in said block as written in said deeds, and also to cancel and set aside a deed made on the 18th day of May, 1882, by Mary A. J. More, acting as attorney in fact for A. B. More, purporting to convey to Mary Spaulding, the appellant, lot 20 in block 447 in Grand View. From a decree in favor of the plaintiff the defendant appeals.

The territory that comprised the city of Grand View is now a portion of the city of Omaha. On the 1st day of April, 1859, the United States, in pursuance of the town site act of congress, approved May 23, 1844, entitled "An act for the relief of the citizens of towns upon lands of the United States under certain circumstances," conveyed by letters patent to the trustees of the city of Grand View, lots one (1), two (2), three (3) and four (4) and the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section twenty-six (26) in township fifteen (15) north, of range thirteen (13) east, of the sixth principal meridian, in what is now the county of Douglas, in trust for the use and benefit for the occu-

pants and owners of said lots and pieces of lands, according to their respective interests.

The lands thus conveyed were platted into blocks and lots, one of the blocks being numbered 447, which contains lot number 20, the one in controversy. The ownership, beneficiary interest and equitable title to the real estate in Grand View, was represented by certain shares therein belonging to the owners and occupants of the lands conveyed as aforesaid by the United States to the trustees of the city of Grand View. The several lots in said city were duly and legally apportioned and set apart to the respective owners of said shares, to the number of nine lots for each share. The names of all the shareholders do not appear, but the record discloses that one Linas Scudder was the owner of shares numbered 26 and 27, and as such he was entitled to, and was allotted, eighteen lots.

After the apportionment of the lots among the owners of shares, in order to carry out the purposes of said trust, and to vest the legal title to the lots in the persons to whom they had been apportioned as aforesaid, Andrew B. More, who was then the chairman of the board of trustees of said city of Grand View, was authorized and directed to execute and deliver to the respective persons to whom said lots were apportioned, deeds of conveyance to said respective lots. In pursuance of the said power and authority conferred upon him, and for the purpose of vesting in said Linas Scudder the legal title to the lots assigned to him, the said Andrew B. More, as such chairman, executed and delivered to said Scudder, on the 15th day of December, 1859, a deed to eighteen lots in the city of Grand View, one of which being described therein as "lot 2 in block 447," which deed was duly recorded in Douglas county.

The said Linas Scudder afterwards died intestate, and subsequently, on the 24th day of May, 1886, his children and heirs at law conveyed to the plaintiff William A. Gwyer, all their right, title, and interest, and the right,

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title, and interest theretofore held by their father in and to the lots in the city of Grand View, which had been allotted and apportioned as aforesaid to said Linas Scudder. In the deed the lots were described the same as in the deed executed by said More, as chairman, to said Scudder.

On the 18th day of May, 1882, Mary A. J. More, acting as attorney in fact for A. B. More, executed and delivered to the defendant Mary Spaulding, a deed of conveyance purporting to convey to the defendant lot 20, in block 447 in Grand View, which deed was recorded in the office of the register of deeds of Douglas county.

The appellee contends that lot 20 in said block 447 was apportioned to said Linas Scudder as the owner and holder of share number 26; that the clerk of the city of Grand View, in entering upon the records of said city the apportionment of lots to said share 26, by mistake entered therein, that lot number 2 in said block 447 was drawn and allotted to the owner of said share, instead of lot 20 in said block; that by mistake lot 2 instead of said lot 20 was described in the deed to Scudder, as well as in the deed from the Scudder heirs to the plaintiff.

The record before us discloses that this plaintiff brought an action in the district court of Douglas county against A. B. More, George E. Baker, W. F. Finch, and Chauncey Wiltse, who, at the time of the apportioning of said lots and at the time of the making of the deed to Scudder, were the legally appointed and acting trustees of the city of Grand View, to which suit the heirs of Linas Scudder, deceased, were made defendants. The object and purpose of the action was to reform the description in the Scudder deed and in the deed from the heirs of Scudder to said William A. Gwyer, so as to make the description read lot 20 in block 447, instead of lot 2 in said block, as therein written. On the 24th day of December, 1888, a decree was entered in said cause reforming said deeds as prayed.

Was a mistake made in the descriptions in the deeds, and

is the appellee entitled to have the same corrected as against the appellant? It is not claimed that there was any fraud on the part of either of the grantors in making the deeds, but that by mutual mistake of the parties thereto, the instruments failed to express the intention of the parties. The contents of the record book of the city of Grand View is relied upon to establish that a mistake was made in describing the lots in the deed to Linas Scudder. This book was lost and could not be produced upon the trial of the cause, although at the previous term of the district court of Douglas county it had been used in the trial of another action. The contents of the books were established by parol evidence, from which it appears that the shares in Grand View were first divided into ten equal bunches, allotting to each bunch nine lots. Then the lots drawn in that manner were sub-allotted between the owners of the shares in each group. In apportioning the lots into ten equal parts, lots 1 and 2 in block 447, with other lots, fell to shares 1 to 10, and shares 21 to 30 drew, in addition to other lots, lots 19 and 20 in said block 447. It also appears that subsequently in the sub-allotment of the lots to shares 1 to 10, lot 2 in block 447 was apportioned to share number 7, owned by one R. L. Sumner, and said lot was conveyed to him on the 5th day of March, 1859; that in the sub-selection of lots that went to shares 21 to 30 inclusive, share 26, which was owned by Linas Scudder, drew said lot 2, in block 447, and it was deeded to him December 15, 1859. The record book of the city of Grand View fails to show that lot 20 in block 447 was apportioned to any share. The clerk of the city, in entering upon the records the apportionment of the lots to the owner of shares, wrote the number of the lots in figures. It is evident that lot 20 in block 447, was drawn by share 26, and that a clerical error was committed by the keeper of the records of the city in omitting the cipher after the figure 2. Lot 2 in said block had already been drawn by the owner of

share number 7, and clearly it was not the intention to apportion it a second time to the owner of another share, while lot 20 in the first division was properly allotted to shares 21 to 30 inclusive, and all the shares in that group, except share 26, having received the requisite number of lots, the conclusion is incontrovertible that lot 20 belonged to the owner of share 26, and was allotted to it, but by mistake lot 2 was entered upon the record of the city in its stead as having been drawn by share 26.

For the same reasons we are of the opinion that lot 2 instead of lot 20, in block 447, was erroneously inserted in the description, in the deed executed by Andrew B. More, as chairman of the trustees of Grand View, to Linas Scudder. It was the intention by such conveyance to vest in the grantee the legal title to all the lots of which, by virtue of said apportionment of lots, he was the equitable owner. It is unreasonable to suggest that More intended to execute a deed to lot 2, which he had previously conveyed to Sumner, or that Scudder believed that he was accepting such a deed, but rather that both parties to the instrument supposed and believed that it contained the proper description of the several lots apportioned to said Linas Scudder, as the owner of share 26. It does not appear that the error in the description was discovered until long after the Scudder heirs executed their deed to the plaintiff.

As before stated, the description of the lots in the deed of the Scudder heirs to the plaintiff is the same as contained in the deed to Linas Scudder. The 15th and 16th findings of the trial court relating to this conveyance are as follows:

"15. That said last mentioned deed was made, executed, and delivered in pursuance of a contract of purchase, whereby and wherein said William A. Gwyer intended to purchase of and from said grantors therein, and the grantee intended to sell to said Gwyer, among other lots, all the

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lots in said city of Grand View, which in said allotment and apportionment were allotted and apportioned to said share number twenty-six, and to said Linas Scudder, the owner thereof.

"16. That it was the intention of said grantors in said last mentioned deed to describe and convey all their interest, right, and title in and to the lots so apportioned to said share, and to said Linas Scudder; that by mistake lot two in block four hundred and forty-seven, in said city of Grand View, was inserted in said deed last mentioned, instead of lot twenty in said block; that when said last described deed was made, executed, and delivered, both the grantors therein and said William A. Gwyer supposed and believed that the lots therein described were the lots which in said allotment or apportionment were allotted and apportioned to said Linas Scudder."

It is urged by appellant that these findings are not supported by the proofs. The principal testimony bearing upon this branch of the case was given by the plaintiff, from which it appears that neither lot 20 nor any other lot was specifically mentioned at the time of plaintiff's negotiations with the Scudder heirs for the purchase of the property. He knew that Scudder owned two shares in the city of Grand View, for which he had been allotted eighteen lots. Linas Scudder in his lifetime had given the plaintiff a list of these lots, one of which was described as lot 2 in block 447. The plaintiff testified that he bought with reference to Scudder's interest in the city of Grand View, and supposed at the time that the lots described in the deed he received were the lots drawn by the two shares owned by Scudder. The heirs intended to convey to the plaintiff these lots, but by mutual mistake lot 2 in block 447, which they did not own, was described instead of lot 20 in the same block.

That a court of equity will reform the description contained in a deed of conveyance, where it is established by

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clear and satisfactory evidence that the instrument fails to express the intention of the parties, cannot longer be questioned. The doctrine is as firmly settled as anything in the law, and the citation of authorities is unnecessary.

The evidence clearly shows that by mutual mistake neither of the deeds correctly described the property intended to be conveyed, and the error should be rectified by making the instruments conform to the agreements of the parties. No equities have intervened to prevent the granting of the relief demanded. The appellant is not a *bona fide* purchaser of said lot 20 for value. True, she received a deed of conveyance, purporting to convey the lot to her, on May 18, 1882, executed by Mary A. J. More, acting as attorney in fact for A. B. More, but for anything shown in the evidence it was entirely voluntary. Nor does it appear that the grantor therein had any title to convey. The land composing the city of Grand View was conveyed by the United States to the trustees of the city in trust. For the purpose of carrying out the trust, the trustees empowered More, as chairman of the board, to execute deeds of conveyance to the respective equitable owners of the lots. He had no power to convey to any one else, nor could he delegate the authority conferred upon him to another person. *Tecumseh Town Site Case*, 3 Neb., 283.

Is the plaintiff the proper party to bring the action to reform the deeds? A lawsuit must be brought in the name of the person who has an interest in the subject-matter of the action. It cannot be successfully questioned that, when a deed misdescribes the property intended to be conveyed, the grantee therein named may maintain a suit to correct the mistake. Linas Scudder, in his lifetime, and after his death, his heirs, could have successfully prosecuted an action for a reformation of the deed executed to Scudder by Mose for and on behalf of the trustee of Grand View. So the appellee, William A. Gwyer, is the proper party plaintiff in a suit to correct the error in the description in

the deed made to him by the Scudder heirs. While such separate suits could be successfully prosecuted, it does not necessarily follow that the appellee cannot sue for the reformation of both deeds. The correction of his deed would be of no value without the other is reformed. He is interested in having corrected the mistake in the description in the Scudder deed in order to perfect his chain of title, and such interest is sufficient to authorize the appellee to bring the suit. That a grantee may maintain an action to reform the deeds in his chain of title is well settled. (*Cox v. Ellsworth*, 18 Neb., 664; *Busby v. Littlefield*, 31 N. H., 193; *May v. Adams*, 58 Vt., 74; *Parker v. Starr*, 21 Neb., 680; *Mallingly v. Speak*, 4 Bush [Ky.], 316.)

It appears that the appellee, prior to the commencement of this action, made a quit-claim deed to "the estate of Sarah H. Gwyer," describing therein all the property described in the deed to him by the heirs of Linas Scudder. It is claimed by appellant that the plaintiff has no interest in the subject of the action. Lot 20 in controversy is not described in this last conveyance, and the undisputed evidence shows that the deed was a voluntary one, and that the plaintiff received no consideration therefor. It was intended by the grantor as a gift to his children, and while he intended to convey to them all the lots received by him from the Scudder heirs, yet the same mistake was made in the description as contained in the other deeds, and lot 20 not being described in the deed made by Gwyer, the title thereto did not pass. This deed being purely voluntary, resting on no valuable consideration, the grantee named therein could not have it reformed for mistake. (*Conaway v. Gore*, 24 Kan., 389; *Wait v. Smith*, 92 Ill., 385; *Froman v. Froman*, 13 Ind., 317; *Eaton v. Eaton*, 15 Wis., 259; *Hansen v. Michelson*, 19 Id., 498; *Petesch v. Hambach*, 48 Wis., 447; *Quirk v. Thomas*, 6 Mich., 76.)

It follows from what has been said that the appellee has such an interest in the subject of the action as to make him

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a proper party plaintiff. The equities are with the appellee, and the judgment is

AFFIRMED.

THE other judges concur.

NETTIE E. DAVIS, ADMINISTRATRIX, v. A. E. HOUGHTELLIN.

[FILED DECEMBER 18, 1891.]

Negligence: A MASTER IS LIABLE to third persons for damages resulting from the negligence of his servants only when the latter is acting within the scope of his employment.

ERROR to the district court for Jefferson county. Tried below before MORRIS, J.

John Saxon, for plaintiff in error.

W. O. Hambel, and *Marquett, Devesee & Hall*, *contra*, cited cases referred to in opinion.

NORVAL, J.

This is a proceeding in error to reverse the judgment of the district court of Jefferson county, sustaining a general demurrer to the petition of the plaintiff, and dismissing the action. The petition alleges:

"First—That she is administratrix of the estate of Daniel C. Davis, deceased, duly appointed according to law.

"Second—That the defendants are partners in trade, doing business as such at Fairbury, in said county, under the firm name and style of Houghtellin & McDowell.

"Third—That on or about the 28th day of March, A. D. 1888, said defendants were in the possession of certain premises at Fairbury, in said county, whereon they were engaged in the business of feeding cattle and hogs, and had, upon said premises, a quantity of feed and provender for said cattle and hogs. And plaintiff says defendants also kept and employed, in and about their said business, a certain servant and agent, one Allen Ireland by name, for the purpose of guarding said feed, and whose business it was, in the due course of his employment by said defendants, to seize and detain persons who might be found disturbing such feed so provided by defendants.

"Fourth—That on said day the said Daniel C. Davis, then in full health and life, had occasion to go and be upon said premises of said defendants, and she says that while so there the said defendants, by their servant and agent, Ireland, who was then and there present, and acting for said defendants in the due course of his employment as aforesaid, and pursuant to his instructions and orders, attempted to seize and detain, without any lawful process or warrant, the said Daniel C. Davis, deceased. And plaintiff avers that said defendants and their said servant so negligently, carelessly, and unlawfully managed their said business and attempt that the said Daniel C. Davis was then and there shot through his heart with a bullet from a pistol then and there negligently, carelessly, and unlawfully had and held in the hands of defendants' said servant, said Ireland, and Daniel C. Davis was then and thereby instantly killed.

"5th. Plaintiff avers that the death of said Daniel C. Davis, as aforesaid, was caused by the wrongful and unlawful act, neglect, and default of said defendants, and without any just or sufficient cause, provocation, or fault on the part of the said decedent. That they, said defendants, knowingly and intentionally employed said Ireland for the purpose of assaulting and attempting to detain, without

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process or warrant, persons who might go upon their said premises as aforesaid; and that they well knew that their said servant, Ireland, was so armed with said pistol in their said employment, and was likely to so negligently, carelessly, and unlawfully use the same in and about their said business and employment, and that great personal injury and damage, or loss of life, was liable to ensue thereby and therefrom, yet they, said defendants, notwithstanding, did not nor would not prevent and forbid their said servant, but did carelessly, negligently, and unlawfully permit him in the premises, contrary to their duty in that case.

"6th. Plaintiff further states that said Daniel C. Davis, deceased, left surviving him his widow, this plaintiff, and the following named children, his next of kin and heirs, to-wit: Albert L. Davis, aged 17 years; Georgie Davis, aged 14 years; Mary Davis, aged 12 years; Ella Davis, aged 10 years; Stella Davis, aged 8 years, and Emory Davis, aged 2; all residents of the said county, and she says that they have sustained damages by reason of the wrongful act, neglect, and default of defendants, as aforesaid, in the sum of five thousand (5,000) dollars."

This is an action to recover damages for the killing of plaintiff's intestate by one Allen Ireland, who, it is alleged, was at the time in the defendants' employ. The general principle, that a master is liable for injuries to third persons resulting from the negligence of the servant while in the line of his employment, is familiar. It is equally well settled that a master is not responsible for the willful and tortious act of his servant committed outside of the scope of his employment. (*Miller v. B. & M. R. R. Co.*, 8 Neb., 219; *Fuller v. Voight*, 13 Ill., 277; *Oxford v. Peter*, 28 Id., 434; *Moir v. Hopkins*, 16 Id., 313; *DeCamp v. M. R. R. Co.*, 12 Ia., 348; *Cook v. I. C. R. R. Co.* 30 Id., 202; *Cater v. Railway Co.*, 98 Ind., 552; *Gravel Road Co. v. Gause*, 76 Id., 142; *Mehan v. Morewood*, 52 Hun., 566; *Laffitte v. N. O. City & L. R. Co.*, 8 So. Rep.

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[La.], 701; *Frash v. Freeman*, 43 N. Y., 566; Cooley on Torts, 533 *et seq.*)

The sufficiency of the petition therefore depends upon whether it charges that the act of killing Davis was done in the prosecution of the defendants' business and within the range of the servant's employment. The third paragraph of the petition charges that Allen Ireland was employed by the defendants to guard certain feed belonging to them upon their premises, and to seize and detain persons who might be found disturbing such feed. This is the only allegation of fact in the entire pleading relating to the nature and scope of Ireland's employment. As to the act of killing it is averred, in effect, that the deceased had occasion to be upon defendants' premises, and while so there said Ireland, in attempting to seize and detain said Davis, negligently, carelessly, and unlawfully, shot and killed him. There is no allegation that Davis was molesting the feed or attempting so to do, or that it was any part of Ireland's duty to seize and arrest persons who happened to be upon the premises, except those who were there for a specified purpose. ●

It is obvious that the averment in the fourth paragraph of the petition that Ireland "was acting for said defendants in the due course of his employment as aforesaid, and, pursuant to his instructions and orders, attempted to seize and detain," is a mere conclusion, and not a statement of any fact showing that the attempted seizure and detention of Davis was within the range and authority of Ireland's duties. Likewise the allegation in the fifth paragraph that Davis' death "was caused by the wrongful and unlawful act, neglect, and default of said defendants," is the statement of a conclusion of law which the demurrer does not admit. It is only facts that are well pleaded which are confessed by general demurrer.

So far as the allegations in the petition are concerned, or the legitimate inferences to be drawn therefrom, Ire-

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land's employment was exclusively in guarding and protecting the feed, and the wrong charged was something which his agency did not contemplate and which he could not lawfully do in the name of the defendants. His business no more contemplated the seizure of a person who was upon the defendants' premises for a lawful purpose than it did the arrest and detention of a person lawfully passing along the public highway near the property, and in neither case would the defendants be liable for the act. The test of a master's liability is not whether a given act was done during the existence of the servant's employment,^x but whether it was committed in the prosecution of the master's business. As was well said by Mitchell, J., in the course of his opinion in *Morier v. St. Paul, M. & M. Ry. Co.*, 31 Minn., 351, "Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was *at the time* engaged in serving his master. If the act be done while the servant is *at liberty* from the service and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself and as his own master, *pro tempore*, the master is not liable. If the servant step aside from his master's business, *for however short a time*, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities."

In *Golden v. Newbrand*, 2 N. W. Rep. [Ia.], 537, was where a servant, employed to guard a brewery, shot and killed a person who had been damaging the property, but was retreating when shot. It was decided that the killing was not done in the line of the servant's duty, and that the master was not liable therefor. To the same effect is *Candiff v. Railroad Co.*, 7 So. Rep. [La.], 601.

The fair construction of the language of the petition shows that the killing of Davis was the willful and intentional act of Ireland, committed outside of the course of his employment, and for which the defendants are not responsible. We are of the opinion that the petition fails to state a cause of action, and the demurrer was properly sustained. The judgment is

AFFIRMED.

THE other judges concur.

SALLIE H. H. LOWE V. CITY OF OMAHA.

[FILED DECEMBER 18, 1891.]

1. A petition in error must specifically point out the rulings of the trial court, on the admission of testimony, which are relied on for a reversal, or they will not be considered.
2. —: CITIES: CHANGE OF STREET GRADE: DAMAGES. When city property is damaged by reason of the grading of the street upon which it abuts, the owner is entitled to remuneration. The difference in the market value of the property with the improvement and that without it, not considering general benefits shared by the general public, is the rule of compensation. In such case special benefits to the property directly attributable to the improvement, may be set off against the damages sustained by the owner. (*Schaller v. City of Omaha*, 23 Neb., 325.)

33	587
40	63
40	188
40	515
40	732
41	243
33	587
42	848
43	734
33	587
44	632
33	587
46	313
54	631
55	458
38	587
180	66

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3. ———: ———: ———: THE MARKET VALUE is not what the property is worth solely for the purpose for which it is devoted, but the highest price it will bring for any and all uses to which it is adapted, and for which it is available.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Kennedy & Gilbert, for plaintiff in error, cited: *Schaller v. Omaha*, 23 Neb., 325, and cases.

A. J. Poppleton, *contra*, cited, as to what constitutes special benefits: *Roberts v. Com'rs Brown Co.*, 21 Kan., 247; *Springfield v. Schmook*, 68 Mo., 394; *Palmer Co. v. Ferrell*, 17 Pick. [Mass.], 58; *Trosper v. Com'rs*, 27 Kan., 391; *Allen v. Charlestown*, 109 Mass., 243; *Sexton v. N. Bridgewater*, 116 Id., 200; *Allegheny v. Black's Heirs*, 99 Pa. St., 152; *Hilbourne v. Suffolk Co.*, 120 Id., 393; *Cross v. Plymouth*, 125 Id., 557.

NORVAL, J.

The plaintiff in error is the owner of the north half of block 146 in the city of Omaha, and a strip of land 20 feet wide and 264 feet long adjoining said premises on the south. The half block consists of four lots, each being 66 feet by 132 feet. The property is bounded on the east by Sixteenth street, on the north by Harney street, and on the west by Seventeenth street. The following statement of the case we take from the plaintiff's brief:

"In the year 1873 the city authorities established a grade upon Harney street, running east and west in front of said premises, by which initial points of grades of Sixteenth and Seventeenth streets were fixed at their intersections with Harney street. The grade elevation at the intersection of Sixteenth and Harney being 118 feet; at the intersection of Seventeenth and Harney 135 feet; and at the intersection of Sixteenth and Howard streets the elevation

was 100 feet. There was a break in the grade on Sixteenth street, midway between Harney and Howard, about opposite the southeast corner of the plaintiff's premises. The gradient of Sixteenth street along the east side of the plaintiff's premises was about one per cent, or one foot in 100 feet, and on Harney street along the north side of said premises, six and four-tenths per cent from Sixteenth to Seventeenth streets, which would have left the surface of the plaintiff's premises four or five feet above the curb line at Seventeenth street, and about fifteen feet above the curb line of Sixteenth street.

"In the year 1883 the grade of Harney street was changed by the city, commencing at a point on the established grade line, about midway between Sixteenth and Seventeenth streets, running westward to an elevation of 130 feet at Seventeenth street, in which year Sixteenth street was graded in conformity to the 1873 grade, and an approach was made on Harney from Sixteenth.

"In 1885 these grades were again changed by lowering the grade at Sixteenth and Harney, ten feet, and at Seventeenth and Harney, fifteen feet."

From an appraisal of damages, an appeal was taken by the plaintiff to the district court, and the work of grading commenced on Sixteenth, Seventeenth, and Harney streets. On November 7, 1885, the plaintiff commenced an action for damages for grading on Sixteenth street in 1883, for which no damages had been allowed, no proceedings having been taken to ascertain such damages. Issues were joined in this action in which the defendant pleads special benefits in offset to the damages sustained. While the work of grading was being prosecuted, and early in 1886, another change of these grades was made by the city, again lowering them at the intersection of Sixteenth, Seventeenth, and Harney streets, about four or five feet, and from these proceedings the plaintiff also appealed to the district court. These cases were, by the order of the court,

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consolidated and tried together. On the 25th day of February, 1889, a trial was commenced to a jury and continued from day to day until March 6th, on which day a verdict was returned by the jury in favor of the defendant. The plaintiff's motion for a new trial was overruled and judgment rendered on the verdict.

The petition in error contains seven assignments of error:

1. That the verdict is not sustained by sufficient evidence and is contrary to law.
2. That certain errors of law occurred at the trial of said cause which were excepted to at the time by the plaintiff.
3. The court erred in giving the 1, 2, 3, 4, 5, and 6 paragraphs of the instructions of its own motion.
4. The court erred in giving instructions 1 to 9, inclusive, asked by the defendant.
5. The court erred in refusing to give the instructions requested by the plaintiff.
6. The court erred in giving all the instructions given, and refusing those asked by the plaintiff.
7. The verdict of the jury should have been for the plaintiff.

No complaint is made in the brief filed by the plaintiff in error to the giving and refusing of instructions, therefore the 3d, 4th, 5th, and 6th assignments will be regarded as waived, and will not be considered by us.

Counsel contend that error prejudicial to the plaintiff was committed by the trial court in permitting the city to introduce testimony tending to show that the grading of the street increased the value of the plaintiff's property for business purposes. We suppose this question was intended to be raised by the second ground of the petition in error, but this assignment is too general. When a party desires this court to review the rulings of the trial court on the admission or exclusion of testimony, he must specifically point out the alleged errors in the petition in error. This

has been held in a long line of decisions. (*Tomer v. Dinamore*, 8 Neb., 384; *Shaffer v. Maddox*, 9 Id., 205; *McCormick v. Drummatt*, Id., 384; *Graham v. Harnett*, 10 Id., 517; *Birdsall v. Carter*, 11 Id., 143; *Cook v. Pickrel*, 20 Id., 435.) The relevancy of the testimony will not be now discussed, and will be considered hereafter only so far as is deemed necessary to the proper disposition of the other questions, which are sufficiently raised by the record.

The remaining assignments, the 1st and 7th, present the same proposition, Is the verdict sustained by sufficient evidence? The defendant claims that the plaintiff's property was not damaged by reason of the grading of the streets upon which the property abuts, for the reason that the special benefits to the property resulting directly from the improvements are equal to or greater than the damages sustained.

The testimony shows that the property is situated near the business portion of the city, being separated from the court house by a street, and only a block distant from the Bee and New York Life buildings. At the time the grades were changed there were upon the premises a large brick dwelling, with stone basement, valued by the witnesses from \$25,000 to \$50,000, a brick barn worth between \$3,000 and \$3,500, besides trees and other improvements. The house was occupied by the plaintiff as a homestead. The premises are situated upon a hill, the natural surface of the ground being from twenty-eight to thirty feet above the last grade established in 1886. Plaintiff was not the owner of the property when the 1873 grade was fixed, and did not own two of the lots until after the grade was changed in 1883. When the grading was completed the property was so situated that the barn had to be taken down to prevent its falling, and, in order to reach the residence, stairs from the street, containing from forty to fifty steps, were constructed. To bring the property down to the proper grade requires the removal

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of about 26,000 yards of earth, the removal of 19,000 yards being made necessary by the last three changes of grade. The cost of removing the dirt, as estimated by the witnesses, would be from fifteen cents to twenty-five cents per yard.

The testimony introduced by the plaintiff goes to show that it is impracticable to lower the dwelling, and that on account of the grading of the streets plaintiff's premises were depreciated in value to the amount of the entire improvements thereon and the cost of grading the lots. Some of the plaintiff's witnesses testify that her property was depreciated fully thirty-three per cent of its former value, which is variously estimated at sums ranging from \$110,000 to \$170,000.

The testimony offered by the city tends to show that the natural surface of Harney street in front of the premises, was a rise of ten feet in a hundred; or a rise on that street of forty-six feet between Fifteenth and Seventeenth streets, and that there was a descending grade of about seven per cent from Seventeenth to Eighteenth streets, or a fall of thirty-four feet from Seventeenth to Nineteenth streets; that before any grading was done there was no facility for travel on Harney street, and although plaintiff's property was within a block of the business portion of the city, yet prior to the grading, it was desirable only as a residence and was entirely inaccessible for business purposes; but as soon as the grading was finished the business part of the city pushed west towards plaintiff's premises; that immediately before the passage of the grade ordinance in 1885, the property did not exceed the value of \$125 a foot front; but that as soon as the work was finished it was worth from \$400 to \$600 a foot front.

That there was a large increase in the value of the Lowe property between the passage of the ordinances changing the grade and the completion of the improvements of the streets is fully proven. It likewise appears that this in-

crease is not wholly influenced by the improvements of the streets upon which this property abuts, but that owing to the rapid growth of the city and the construction of these and other improvements there was a general advance in values all over the city, which to a considerable degree affected this property. But the general increase in value is not to be considered as an element in ascertaining whether the plaintiff is entitled to compensation or not. She was as fairly entitled to the benefit of this general appreciation, as her neighbors who had not been in any manner disturbed in the enjoyment of their property. This rule is too well settled and understood to need support from adjudged cases.

There is in the record abundant testimony conducing to show that a great portion of the enhanced value of plaintiff's property was directly attributable to the grading of the streets bordering the same, and that the premises were especially benefited by the improvements. It is no longer an open question in this state that when private property is damaged by reason of the construction of a public improvement near it, remuneration must be made, and the difference in the market value of the property with the public improvement and that without it, not considering general benefits shared by the general public, is the rule of compensation. Special and peculiar advantage which the property receives from the improvement is to be considered in determining whether there is injury or not. In other words, special benefits to the property may be set off against the damages sustained by the owner. This rule affords complete indemnity to the individual and leaves him in as good condition as he was before the making of the improvements. (*Schaller v. City of Omaha*, 23 Neb., 325; *City of Omaha v. Kramer*, 25 Id., 489.)

The plaintiff contends that the grading of the streets did not enhance the market value of her property specially, and beyond the mere general appreciation of other prop-

erty. This position would be well founded if it is allowable only to take into consideration the use to which the property was devoted when the improvements were made. The grading of the street certainly did not enhance the value of the property for the purpose of a residence, the use to which it was applied. In determining its value without the improvement it was proper to take into consideration not only the use to which it was at that time devoted, but the availability for any other purpose and the demands therefore, so far as the same entered into and affected its market value. If it was worth most in the market as a residence the plaintiff was entitled to have such value considered, but if it would have sold for the highest price for some other use to which it was adapted, she was entitled to that. The market value of anything is the highest price it will bring for any and all uses. So, if in consequence of the improvement of the streets, the property was made accessible for, and was best adapted for a purpose other than that to which it was devoted, such as sites for business houses, and was worth most in the market for such purposes, it was competent to take it into consideration in determining whether the plaintiff was injured by grading of the streets. Neither the plaintiff nor the city was confined to the market value of the property as a residence, if it was more valuable for some other use.

A case in point is *In the Matter of Furman St.*, 17 Wend. [N. Y.], 649. The report of the case shows that one Peter W. Radcliff owned a lot in the city of Brooklyn extending from Columbia to Furman street. His dwelling house fronted on Columbia street, and the rear portion of the grounds were laid out and cultivated as a fruit and ornamental garden. Radcliff purchased the lot and built the house thereon solely for the purpose of a permanent home. The street in the rear of his lot was ordered by the city authorities cut down forty-five feet in depth. Bronson, J., in passing upon the question of damages, observes, "It

it not unnatural that any one in the possession of a highly cultivated garden and pleasure ground, with a dwelling which overlooks the city and bay of New York, should desire to continue all things around them in their present condition; and to a person who, in the evening of a well spent life, has retired from the bustle of the city and the pursuit of an arduous profession to seek repose in such situation, the thought of being broken up in his final arrangements for life must be peculiarly painful. To his ears it will sound like a sad misnomer to call that improvement which, in its effect, will blast the trees and shrubs and wither the vines and the flowers which his own hands have planted. But, however much the necessity for disarranging the plans of any individual may be regretted, the great principle upon which public improvements are to be effected must be substantially the same in all cases. All classes and conditions of men hold their property subject to the paramount claims of the state, and when it is taken for public purposes, and the question of compensation is presented, the only proper inquiry is, What is its value? The question is not what estimate does the owner place upon it, but what is its real worth, in the judgment of honest, competent, and disinterested men? The use to which the owner had applied his property is of no importance beyond its influence upon the present value. If highly cultivated, it will be worth more than though it had been suffered to run to waste. I cannot yield to the argument that the commissioners were bound to regard only the use to which the property is now applied, and pay the appellant a sufficient sum of money to secure him in that mode of enjoyment for the future. They might properly take in consideration the more advantageous use to which the property may be applied in consequence of the opening of a new street. In a case like this, the proper mode of adjusting the question of damages is to enquire, What is the present value of the land, and what it will be worth when the contemplated

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work is completed? In deciding these questions, neither the purpose to which the property is now applied, nor the intention of the owner in relation to its future enjoyment, can be matters of much importance. In both cases the proper inquiry is: What is the value of the property for the most advantageous uses to which it may be applied? * * * In relation to the several persons who will be affected, the commissioners are required to make, an 'estimate of the damages and an assessment of the benefit which will be sustained and derived by them respectively from such improvements.' It is the influence of the improvement upon the actual value of the property which the commissioners are to consider. If the property will be more valuable when the work is done than it was before, the owner will not sustain any damages, but will derive a benefit from the improvement."

To the same effect we cite the following: *M. & R. R. Boon Co. v. Patterson*, 98 U. S., 403; *King v. M. W. R. Co.*, 32 Minn., 224; *Gooden v. Canal Co.*, 18 O. S., 169.

In this case the proofs show that plaintiff's property was specifically benefited by reason of the grading. Before the improvement it was not desirable nor specially valuable as business property, but by grading the surrounding streets it was thereby rendered accessible and desirable for such purpose, and its market value was thereby greatly increased. In view of the testimony we think the jury were justified in finding that the special benefits which the property derived from the grading of the streets were in excess of the damages resulting therefrom. The judgment is

AFFIRMED.

THE other judges concur.

MARGARET W. ALLIS ET AL., EX'RS, APPELLEES, V.
HENRY NEWMAN ET AL., APPELLANTS.

[FILED JANUARY 4, 1892.]

Review. The pleadings and evidence examined, and *held* to sustain the decree; and not to sustain the exceptions of either party, both of whom appealed.

APPEAL from the district court for Hamilton county.
Heard below before NORVAL, J.

Hainer & Kellogg, and *J. H. Smith*, for appellants.

R. S. Norval, and *A. W. Agee*, *contra*.

COBB, CH. J.

This action was brought in the district court of Hamilton county by Edward P. Allis in the name and style of Edward P. Allis & Co., plaintiff, against Henry Newman, Emilie Arndt, and August Arndt, defendants. The object and purpose of the action, and the prayer of the petition, was to subject certain real property situated in Hamilton county, to-wit: the southwest quarter of section twenty-four (24), and the north half of the northwest quarter of section twenty-five (25), all in township eleven (11) north, of range five (5) west, of the sixth (6th) principal meridian, which had been conveyed by said defendants Emilie Arndt and August to the defendant Henry Newman, to a certain judgment theretofore obtained by the said plaintiff in the district court of Seward county against the defendants Emilie Arndt and August Arndt, together with one Bertha Tiede and one Herman Tiede, defendants therein; that the said conveyance by the Arndts to Newman be adjudged fraudulent and void, and that said land be sold by or under the direction of the sheriff of Hamilton

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county, and the proceeds of such sale applied to the satisfaction of the said judgment, etc.

The petition contains all the allegations usual in such cases. The defendant Henry Newman answered, and in his answer admitted that said Emilie Arndt and August Arndt are and have been, during all the time mentioned in plaintiff's petition, wife and sister and brother-in-law respectively to him the said Henry Newman. That on the 11th day of February, 1886, the said Emilie Arndt and August Arndt conveyed the premises described in plaintiff's petition to the said answering defendant. Further, that he denies each and every allegation in said petition contained, and not in his said answer theretofore admitted.

The said defendant further averred that on said 11th day of February, 1886, the said Emilie Arndt being the owner in fee simple of said lands, the answering defendant purchased the same of the said Emilie Arndt in good faith for a valuable consideration, and without any knowledge or notice of any indebtedness whatever owing by said Emilie Arndt and August Arndt, or either of them, to the plaintiff or other person, except as evidenced by the mortgages then on the said land, and that the defendant then and there paid said Emilie Arndt the full price for said lands, to-wit, the sum of \$4,860, as follows: \$1,300 by assuming said mortgages on said lands aggregating said amount, of which said mortgages defendant has since paid the sum of \$100 in cash; \$2,000 in a certain promissory note for said amount made by him, said answering defendant, in favor of said Emilie Arndt; and the remaining \$1,400 in notes of other parties held by said defendant and turned over to said Emilie. Further, that at said time said Emilie Arndt and August Arndt, with their child, constituted one family; that of said premises the southwest quarter of section 24, in township 11 north, of range 5 west, was in fact the homestead of said Emilie Arndt and her said family where she was with them as such family, and actually resid-

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ing thereon as such homestead, and that said premises so occupied as a homestead as aforesaid did not exceed 160 acres of land nor \$2,000 in value over and above said mortgage, and that by reason of such occupancy the same was not subject to fraudulent sale and was exempt from judgment liens and from execution or forced sale; that said \$4,800, paid as aforesaid, being the full value of said lands and thereupon and for said consideration, in good faith and without knowledge or notice of any indebtedness whatever owing by said Emilie Arndt or August Arndt, or either of them, to any person whomsoever except as evidenced by said mortgage, and without notice or knowledge of any fraud or intent to hinder, delay, or defraud any one, on the part of any persons, said defendant accepted and received from said Emilie Arndt and August Arndt, as wife and husband, a warranty deed of conveyance of said lands to him subject only to said mortgages assumed as aforesaid, which said deed was duly recorded.

For a further defense the said answering defendant further set out and alleged that the said Emilie Arndt never was in any way nor for any amount whatever indebted to the said plaintiff, nor did she ever enter into any contract whatever with the plaintiff, and the only claim or demand said plaintiff has, or ever had, against any of said parties mentioned in his petition, and the only debt ever in any way contracted, incurred, or in any way assumed by any of said persons in favor of the plaintiff, is under and by virtue of a certain written contract made and entered into on the 5th day of November, 1885, by and between the plaintiff on the one part and the firm of Tiede & Arndt, composed of said Herman Tiede and August Arndt, which said agreement and contract is in the words and figures following, to-wit:

"This indenture, made this fifth day of November, 1885, between Edward B. Allis, doing business under the firm name of Edward B. Allis & Co., of Milwaukee, Wiscon-

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sin, party of the first part, and Herman Tiede and August Arndt, composing the firm of Messrs. Tiede & Arndt, Marysville, Nebraska, parties of the second part, witnesseth: That the said party of the first part, in consideration of three thousand seven hundred and eighty-three $\frac{87}{100}$ dollars to be paid to him by the parties of the second part, at the time and in the manner hereinafter stated, agrees to manufacture and furnish, at Milwaukee, Wisconsin, and at the factory where made, all to be of good material and workmanship, the following articles, to-wit: (Here follows a list of mill machinery). The above specified machinery and supplies to be of good material and workmanship and loaded on board of cars at place of manufactory, at earliest possible date, and said first party to secure best possible freight rates. The parties of the second part agree to secure party of the first part in deferred payments by first mortgage on mill property, same to be free from any incumbrance to secure party of first part wholly, and second parties further agree to pay all freights to and cartage from factory to mills; the party of the first part to furnish flow sheets and plans for millwright work, and the said parties of the second part hereby agree to pay for said articles, etc., as follows, to-wit: Twelve hundred sixty and $\frac{29}{100}$ dollars upon starting the mill, eight hundred forty and $\frac{82}{100}$ dollars one year from starting the mill, \$840.89 two years from starting the mill, \$840.89 three years from starting the mill. When said articles are completed and ready for delivery the said parties of the second part shall execute and deliver to said party of the first part notes for all amounts on which time is to be given, payable at the time above stipulated, bearing interest at the rate of ten per cent per annum from date of starting the mill. All payments to be made at Milwaukee, and the parties of the second part hereby agree to pay all costs of exchange. If the said parties of the second part shall neglect or refuse to give the notes, as herein provided, on demand from said

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party of the first part, then the whole amount shall become due on such refusal, and shall be collectible the same as if the goods had been ordered for cash. The parties of the second part agree to take out and maintain sufficient insurance upon the property hereinbefore described, to fully protect the interests of the party of the first part in the same, and to assign the said insurance to said first party, and to deliver the policies to said first party, and to keep said insurance in full force and effect until all accounts due to said party of the first part for said property and labor are paid in full. In case said party of the second part neglect to effect such insurance within one week from the commencement of the work under this contract, it is mutually agreed by the parties hereto that the party of the first part may procure such insurance, and that the parties of second part will refund to him such premiums as he may be obliged to pay for the same. The parties of the second part agree to pay all expenses incurred in getting description of property, making and filing mortgages and liens, and all other expenses incurred by the party of the first part in perfectly securing the deferred payments; and the parties of the second part also agree to pay all expenses of foreclosure and collection. And the parties of the second part agree that in case they shall fail to pay any of said notes or accounts when due, then all unpaid notes and accounts shall become due and collectible at once, and that the said second parties will waive all rights by reason of said notes or accounts having had longer time to run before due. And said parties also agree that the taking by said first party of said notes, shall not waive his right to a mechanic's lien for said machinery and material. It is hereby agreed that said party of the first part is to use his best endeavors to have said articles ready for shipment at the time stated herein, and also that they shall be of the stated quality; but he is not to be held liable for any pecuniary damage in either case, except to make good any unmerchant-

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able defect which may be proved to exist in such article when furnished. This contract is not binding upon said party of the first part until it has been accepted by him at his office in Milwaukee."

Signed by Hirman Tiede and August Arndt, and witnessed.

That on the 12th day of November, 1885, the said plaintiff, duly and in writing, accepted said contract in and by a certain letter written, directed, and sent by said plaintiff to the said Tiede and Arndt, which was in the words and figures following, to-wit: (the letter amounts only to a ratification of the foregoing agreement by the plaintiff).

That under said contract said plaintiff furnished and delivered to said Tiede and Arndt between the 12th day of November, 1885, and the 27th day of February, 1886, inclusive, divers and sundry materials and machinery to be used in the construction and repairing of the mill mentioned in said contract, but the exact nature and value thereof is unknown to the answering defendant. The debt thus and thereby incurred and contracted by said Herman Tiede and August Arndt, under the firm name Tiede & Arndt, is the identical debt for the satisfaction of which the said plaintiff seeks in this action to subject the lands of this defendant, as aforesaid sold and conveyed to him.

Said defendant further avers that said Emilie Arndt never was a member of said firm of Tiede & Arndt, nor did she at any time, nor in any manner whatever, have or claim to have any right, title, possession, or interest in or to any part of the property sold and delivered by the plaintiff to said Tiede & Arndt, nor was she in any way a party to said contract, nor did she ever authorize any one to make said contract in her behalf, and that in truth and in fact said contract was not made for her benefit, nor has she ever received anything thereunder, nor had she any knowledge whatever of the existence of said contract until long after said contract was made, and said Emilie Arndt

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was in nowise consulted in regard to said contract, and never in any way exercised any control over any part of the property delivered under said contract or have anything to do therewith, and no part thereof ever came into her possession, nor was it the thought or intention of any of the parties thereto, at the time of making said contract or delivering any part of said property, to in any way bind the said Emilie Arndt thereby, or to look to her for the payment of the amount due the plaintiff thereunder. Nor had said Emilie Arndt any notice or intimation whatever that plaintiff in any way looked to her for the payment of any part of his claim until long after said conveyance to this defendant.

He further alleges that neither at the time of making said contract, nor for a long time before said date, nor at any time since then, has said Emilie Arndt had or claimed to have any right, title, possession, or interest, in or to any part of the lands whereon said mill was situated, nor in or to any lands whatever in Seward county, except her right of dower in said lands whereon said mill was situated, and that the legal title in and to said mill lands was at the time said contract was made in said August Arndt and Bertha Tiede, as was at the time fully disclosed by the deed records of said Seward county, where said mill lands were situated, as said plaintiff well knew.

That on the 27th day of February, 1886, the said plaintiff duly filed his account for said materials and machinery furnished under said contract, verified as required by law in cases where mechanics' liens are claimed, in the office of the county clerk of said Seward county, and thereby claimed a mechanic's lien on said mill and the lands whereon the same was situated, for the full amount claimed by the plaintiff under said contract, to-wit, the sum of \$3,783.87, with ten per cent interest thereon from February 25, 1886, and caused the same to be duly recorded in Mechanics' Lien Record No. 2, of said county

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at page 162 thereof. Said mill and real estate, whereon said plaintiff has and claims a mechanic's lien for the entire amount due him, is of the value of \$8,000, and said mill is now being fully operated by said Bertha Tiede and Herman Tiede, and while the value of said property exceeds the said claim of the plaintiff, no proceedings have been instituted or had either at law or equity to enforce said lien against said mill and property, nor has the plaintiff in any way ever attempted to enforce any part of his said claim against said mill property although he has all along had knowledge of all the foregoing facts.

That on the 22d day of February, 1886, the said August Arndt duly sold his interest in said mill and mill property to said Bertha Tiede for value, and the said August Arndt and Emilie Arndt, as husband and wife, by the deed of that date duly conveyed said mill and mill property to said Bertha Tiede, which said deed was duly filed for record in the office of the county clerk of said Seward county on the 23d day of February, 1886, and by him duly recorded in Book W of the deed record of said Seward county, at page 229 thereof, and no transfer nor sale of said property nor any part thereof has since been made. That in and by the express terms of said deed said Bertha Tiede assumed and agreed to pay said claim and debt of the plaintiff as a part of the consideration for said sale and transfer. And that of all the foregoing facts and circumstances the said plaintiff at all times has had full and actual knowledge.

The said defendant, further answering, and still denying that the plaintiff ever obtained a judgment against said Emilie Arndt by him mentioned in his petition, avers that if the court should, on the proofs submitted, find that such judgment was in fact obtained, that the same is void and of no effect as against this answering defendant, for the reason that if the same was at all obtained it was so done by means of fraud and wholly without consideration as to said Emilie Arndt.

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That the only order ever given to the plaintiff for the machinery mentioned in the pleading in this cause was and is the written agreement signed by Herman Tiede and August Arndt, and the letter of acceptance written said Tiede & Arndt by the plaintiff, and both set out in this answer; that said agreement and letter of acceptance constitute the contract for said machinery, and the contract upon which said machinery was actually furnished; that said Emilie Arndt was not indebted on said contract to said plaintiff, nor was she in any way a party to the same; that no reference was made to said contract, order, and letter of acceptance in the pleadings on which said pretended judgment is based, nor is it averred therein that the same was in writing; nor was the same in any way brought to the notice or knowledge of said court; but on the contrary it is averred in said pleading that said order was given by Emilie Arndt and August Arndt, Herman Tiede and Bertha Tiede, although the said plaintiff well knew at the time that said Emilie Arndt and Bertha Tiede were not parties to said contract, and said judgment, if at all rendered, was so done on default of the defendants.

With prayer for judgment, etc.

The plaintiff, by reply to the above answer of the defendant Henry Newman, admitted that he made the account, and that items of machinery and mill furniture for the erection of the mill mentioned in defendant's amended answer, and after making oath thereto as required by law, he filed the same in the office of the clerk of Seward county, and claimed a mechanic's lien upon said mill and the real estate upon which the same was situated, as mentioned and described in said defendant's amended answer; but this plaintiff avers that at the time of filing the statement claiming said lien there then existed upon said property good and valid prior mortgages and liens amounting in the aggregate to over \$3,000, together with interest and taxes due against said property, and that said mortgages and

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liens were and are unpaid, and that the value of said mill property and real estate at the time of the recovery of the judgment, as stated in plaintiff's petition, did not exceed the sum of \$3,800.

That plaintiff caused an execution to be issued upon the judgment mentioned and described in his petition in this action, and attempted to have said property sold thereunder, and that the prior liens, and judgments, and taxes against said property exceeded the amount and value of said mill property, and that the sale thereunder would have been to no purpose, and that the plaintiff could have realized nothing upon his said mechanic's lien.

That the said Emilie Arndt, defendant, was legally and equitably liable upon the indebtedness upon which said judgment was obtained; that the said machinery furnished for the construction of the said mill upon said property was furnished at her request and upon her promise and agreement to pay the same; and plaintiff avers that the title to the undivided one-half of said real estate at the time of the furnishing of said material and machinery stood of record in the name of said Emilie Arndt, and remained in her name till the 22d day of February, 1886, when the said defendants Emilie Arndt and August Arndt, her husband, joining her, fraudulently and without any consideration made, executed, and placed upon record a warranty deed to the said undivided half of said property to one Bertha Tiede, who was the daughter of the said Arndts; that said deed was made and placed upon record by the said Arndts to the said Bertha Tiede without her knowledge or consent, and for the purpose of placing said property out of the hands of said Arndts, and for the purpose of avoiding the payment to the plaintiff of his said claim for the mill machinery so sold and delivered for the construction and erection of said mill, and plaintiff denies that said Bertha Tiede in said deed or otherwise ever assumed or agreed to pay the claim and lien of this plaintiff,

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except as she was legally bound to do, by reason of having at the time of the purchase of the same agreed to pay the same in connection with the said Arndts.

That at the time plaintiff recovered the said judgment against the said Emilie Arndt and August Arndt, Bertha Tiede and Herman Tiede, all the said defendants in said judgment were wholly insolvent, and the real estate mentioned in the said defendants' answer and situated in Seward county was insufficient to pay the prior legal valid and due liens upon said property; and plaintiff denies that at the time of the commencement of this action, or at any time since, that said real estate and mill property was sufficient in value to enable plaintiff to make and collect his said judgment or any part thereof, and that said plaintiff made due diligence to find property of said defendants in said judgment, or either of them, whereupon to levy and collect his said judgment.

And that plaintiff denies that the said Emilie Arndt had no claim or possession, right or title, or interest in and to the said lands and mill in Seward county at the time of making the contract for said machinery as alleged in said defendant's answer; but alleges that she was at the time in the possession of said property as tenant in common with the said Bertha and Herman Tiede, and that the said Emilie Arndt fully ratified and approved of the said contract for the purchase of said machinery, and accepted and received the same to be placed in the mill upon said property, and all of which was well known to the defendant Henry Newman at the time he took the deed to the real estate mentioned and described in said plaintiff's petition.

And that at the time of the making of the deed by the defendants Arndt to the defendant Newman the said Newman well knew and had actual knowledge of the indebtedness of the said Arndts and Tiedes to this plaintiff, and said Newman took the deed to the real estate in said petition described for the purpose of hindering, delaying,

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and defrauding said plaintiff in the collection of his said claim against the said Tiedes and Arndts. And that the said defendant Newman paid no good or valuable consideration for said land.

That on the 1st day of March, 1887, this plaintiff and other lien-holders, in the district court of Seward county, obtained a foreclosure of their several and respective mortgages and mechanics' liens against the mill property and real estate mentioned and described in defendant's amended answer, amounting in the aggregate to the sum of \$7,527.61, and which amount plaintiff avers greatly exceeds the value of said property. And that in said proceedings and decree the district court of Seward county appointed a receiver for said property and granted a stay of the order of sale thereunder for the period of nine months; that in said foreclosure one Luke Augur, who held a prior mortgage upon said property, obtained a decree for \$1,536.95, bearing ten per cent interest from that date, and which said mortgage was made a lien prior to the lien of this plaintiff, and that said decree was stayed without security, and that upon the sale of said property under said decree the same will not bring enough to pay the lien against the same, nor will the same be sufficient to pay anything upon the claim or lien of this plaintiff, after paying the prior legal, valid lien, mortgages, taxes, costs, and expenses of foreclosure and sale; and plaintiff avers that said mill and the earnings thereof will not pay the expenses of running and operating the same during the period for which said decree is stayed.

The defendants Emilie Arndt and August Arndt, nor either of them, answered the said plaintiff's said petition, but both made default and their default was duly entered.

There was a trial to the court, which found the issues joined in favor of the plaintiff and against the defendants, and also found that at the date of said deed of conveyance from the said Emilie Arndt and August to the said

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Henry Newman, mentioned in the plaintiff's petition, and covering the southwest quarter of section twenty-four and the north half of the northwest quarter of section twenty-five, all in township eleven north, of range five west, in Hamilton county, Nebraska, was made with the intent to hinder, delay, and defraud the plaintiff and other creditors of the said Emilie Arndt, of all of which said Henry Newman, defendant, had full knowledge at the time of receiving the said conveyance.

The court further found that at the time said conveyance was made the said real estate therein, and in the plaintiff's petition described, was of the value of \$6,000, and that the said southwest quarter was then of the value of \$4,000. The court further found that at the time said conveyance from the Arndts to Newman was made the said August Arndt and Emilie Arndt were husband and wife and constituted one family, and were then, and had been for a long time prior thereto, living upon and occupying the said southwest quarter as their home, and the same was their homestead; that shortly after such conveyance the said Emilie and August Arndt moved from said land and ceased to occupy the same as a homestead; that at the time of said conveyance there was a valid mortgage lien existing against said southwest quarter for the sum of \$600 and to the extent of the value of \$2,000, and pay the said mortgage lien thereon. The said quarter section was not subject to fraudulent alienation, but that the surplus of the said southwest quarter section over and above said sum of \$2,000, and above the said mortgage lien of \$600, is subject to the plaintiff's demand.

The court also found that at the time of said conveyance there was existing a valid mortgage lien upon the said north half of the northwest quarter for the sum of \$700, and that the plaintiff is entitled to have said deed of conveyance set aside. The court also found there was due from the defendants Emilie and August Arndt to the

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plaintiff on the judgment set forth in said petition the sum of \$4,446.74, with ten per cent interest thereon from said date.

It was thereupon considered by the court that the deed described in the said petition from Emilie and August Arndt to the defendant Henry Newman, for the southwest quarter of section twenty-four and the north half of the northwest quarter of section twenty-five, in town eleven north, of range five west be, and the same was thereby, vacated, set aside, and annulled, and that said land should be subjected to the payment of the debt set forth in the petition, subject to the said mortgage thereon amounting to \$1,300, and subject to the said sum of \$2,000 which the defendant Henry Newman is entitled to out of the proceeds of the sale of the southwest quarter, and that out of the proceeds of the sale of the southwest quarter there be first paid to the said Newman the said sum of \$2,000, etc.

Each party excepted to the findings, judgment, and decree of the court, and the case comes to this court by appeal. The bill of exceptions was duly allowed and certified on the 2d day of January, 1888, but having become mislaid the record was not filed in this court until the 20th day of August, 1888. It was then filed and a notice of appeal issued by the defendant Newman. Afterwards a motion was made by the plaintiff for the dismissal of the appeal for the reason that the same was not made and filed in time, and that the defendants had failed to prosecute the said appeal. This motion, being supported and resisted by affidavits, was overruled and an opinion written thereon. (See *Allis v. Newman*, 29 Neb., 207.) This opinion was filed March 25, 1890. On the next day, March 26, the plaintiff having deceased and the cause having been revived in the name of his legal representatives, they made and filed their application for cross-appeal. No objection nor motion having been made to this paper, but the cause having been submitted and briefed without objection in

that regard, I think that the case must be considered as pending on cross-appeal as well as upon appeal.

The title to the land in controversy was, on and previous to the date of the conveyance to the answering defendant Henry Newman, in the defendant Emilie Arndt. At that date the indebtedness of the Arndts and the Tiedes was not in judgment, and if at that time Newman had no notice of such indebtedness and of the purpose of said Emilie Arndt in conveying said land to place the same out of the reach of her creditors, or of such facts as would put a prudent person upon such inquiry as would have led to a knowledge of such facts, and he bought the said lands in good faith and paid a fair and honest consideration therefor, then he would not be affected by the judgment afterwards recovered by the plaintiff against the Arndts and the Tiedes, including Emilie Arndt. But the indebtedness upon which this judgment was afterwards rendered, existed at that time and it had to be placed in judgment before any direct proceeding could be taken for its collection out of the lands of Emilie Arndt. It appears from the record that action was regularly commenced by the plaintiff against the defendants, the Arndts and the Tiedes, in the district court of Seward county; that a petition in due form, with all usual and necessary allegations, was filed and process was regularly issued and personally served upon each of the said defendants, and although they each made default, it appears by the record that the findings and judgment were made and rendered upon evidence given in court upon the petition and bill of particulars, by which it also appears that the indebtedness and cause of action involved therein arose and became vested between the 18th day of December, 1885, and the 22d day of January, 1886.

The defendant Newman in his answer makes a general denial of all the allegations of the plaintiff's petition not specifically admitted. Except in this way he does not deny

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the indebtedness of the Arndts and the Tiedes to the plaintiff. Indeed, as I understand the answer, it virtually admits the indebtedness on the part of August Arndt and Herman Tiede, or rather takes the ground that the order for the mill machinery having been signed only by August Arndt and Herman Tiede that the defendant Emilie Arndt could not be held responsible for the said indebtedness.

It appears from the evidence that at the time of the furnishing of the mill machinery by the plaintiff, which constitutes his claim against the defendants, the mill, together with the land upon which the same is situated, was owned by the said Emilie Arndt; that the mill was carried on, operated, and the new machinery ordered from the plaintiff and placed in said mill by the firm of Arndt & Tiede, of which firm Mrs. Emilie Arndt was a partner; that the said mill machinery was furnished to the said partnership and placed in the said mill, by the plaintiff, upon the contract and promise of the said firm to secure the payment therefor by a first mortgage upon the said mill property, but that there was other and prior mortgages, one or more, then existing and of record upon and against said mill property, by which it was incumbered to its full value; that a lien was filed by the plaintiff upon said mill property for the amount and value of said machinery before the plaintiff ascertained or was advised of the existence of said prior lien, when the plaintiff brought the action against the said defendants, the Arndts and the Tiedes, and recovered the judgment against them for the amount and the value of the said machinery as hereinbefore stated.

The contention on the part of the defendant that the plaintiff cannot successfully attack the conveyance of the land for the reason that he has another remedy, to-wit, the sale of the mill property upon his lien, cannot be allowed, because it is fully established by the evidence that the liens upon the mill property prior and superior to the lien

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of the plaintiff are sufficient to render his lien of little or no value.

The principal point made by the defendant Newman, and to which his counsel cites authorities in the brief, is that the indebtedness upon which plaintiff's judgment at law was recovered did not exist, as against the defendant Emilie Arndt as a valid indebtedness, at the time and date of her deed of the land to him. The law as contended for by counsel is not doubted, but the evidence does not sustain its application to the case. On the contrary, the evidence sufficiently proves that before any of the mill machinery was shipped by the plaintiff, the defendant Emilie Arndt had acknowledged to him, or his agent, that she was a member of the firm which had ordered it, and upon her promise to pay for said mill machinery, out of money to be borrowed by her upon the land in Hamilton county, which she afterwards conveyed to the defendant Newman, and that the delivery of said machinery was made by the plaintiff, and the indebtedness therefor on the part of the defendant Emilie Arndt arose before the date and time of the execution and delivery of the deed, and was then a legal as well as a moral obligation against the said Emilie Arndt.

It will be seen, by reference to the findings of the district court above copied, that it was found by the court that at the date of said conveyance the defendant Henry Newman had full knowledge that the same was made by the said grantors with the intent to defraud the creditors of the said Emilie Arndt, including the plaintiff. From an examination of the evidence I am satisfied that it fully sustains this finding. It appears from the evidence of John Arndt, Herman Platte, and A. W. Agee, that on the day before the one upon which the deed was executed by the Arndts to Newman, they, the Arndts and Newman, all being present at the office of Agee and Stevenson for the purpose of the execution of a deed from the Arndts to

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John Arndt of the land in question, inquiry was made as to whether, in case of such conveyance being made, the land could be taken on debts owing by Emilie Arndt on account of the mill, and other conversation was had between the parties indicating conclusively that the object and purpose of the Arndts in making such conveyance was to place the land out of the reach of the creditors of Emilie Arndt, and especially out of the reach of her debts growing out of her mill transactions.

The defendant Newman was sworn as a witness in his own behalf, and examined at great length, especially as to the consideration which he paid for the land; but his evidence failed to show that he paid any adequate or fair consideration therefor.

The point is made by the defendant Newman that before proceeding by creditor's suit against Newman the plaintiff must have proceeded against the mill property in Seward county on which he had a lien, and also must have issued an execution to Hitchcock county, where the Arndts then resided. The record shows that executions were issued to Seward and Hamilton counties respectively, and severally returned "no property found whereon to levy." It also appears from the evidence that the mill property in Seward county was burdened with incumbrances and liens above its value, prior to the filing of the plaintiff's lien. It does not appear that any of the defendants had property in Hitchcock or any other county. There is evidence tending to prove that when the Arndts left Hamilton county they absconded. Under these circumstances it is not deemed necessary that process should have been issued to Hitchcock county.

As to the case made by the brief of the plaintiff on his cross-appeal, I think that he fails to show or point out wherein the decree is wrong. The evidence clearly establishes the homestead character of the quarter section of land, and the right thereto, in the Arndt family at the

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time and date of the execution of the conveyance. They did not leave or abandon the land until after all the rights of their grantee, under the deed, had fully attached. These rights as between the parties to the deed are as expressed in that instrument, notwithstanding its fraudulent character as to the creditors of the grantors. While there is some evidence tending to prove that the transfer of the land was merely colorable, upon a secret trust that Newman would hold it for his sister's benefit, after she should abandon it, yet this evidence would not warrant us to so hold against the finding of the trial court.

The decree of the district court is

AFFIRMED.

MAXWELL, J., concurs.

NORVAL, J., did not sit.

WALTER G. COMNOCK, APPELLANT, V. JOHN WILSON
ET AL., APPELLEES.

[FILED JANUARY 4, 1892.]

1. **Executions: INJUNCTION.** One C. was possessed of two lots in the city of K. which were mortgaged for a large amount. On the 8th of July, 1886, a transcript of a judgment was filed in the proper office to become a lien on the real estate. On the 15th of that month C. sold and conveyed the property to one T., the amount of the judgment being deducted from the purchase price. T. conveyed to one M., who had notice of the agreement between T. and C. *Held*, That M. purchased subject to the judgment, and that an action brought by him to enjoin the sale was without equity.
2. **Homestead: WAIVER.** Where the owner of a homestead has agreed to satisfy a judgment out of the proceeds of a sale of the homestead, a third party, not in privity with him, cannot claim the benefit of the exemption, particularly where such exemption would result in defrauding the former owner of the homestead.

APPEAL from the district court for Buffalo county.
Heard below before HAMER, J.

R. A. Moore, and *Ira D. Marston*, for appellant, cited: *State v. Krumpus*, 13 Neb., 321; *Jackson v. Creighton*, 29 Id., 310; *Chopin v. Runte*, 44 N. W. Rep. [Wis.], 259; *Spear v. Evans*, 51 Wis., 42; *Mitchelson v. Smith*, 28 Neb., 583; *First Natl. Bank v. Briggs*, 22 Ill. App., 228; *Nichols v. Spermont*, 111 Ill., 633; *Monroe v. May*, 9 Kan., 476; *Colby v. Crocker*, 17 Id., 527; *Kruger v. Harvesting Co.*, 13 Neb., 100; 1 Jones, Liens, secs. 30, 31; *W., St. L. & P. R. Co. v. Ham*, 114 U. S., 587.

Calkins & Pratt, contra, cited: *Cooper v. Foss*, 15 Neb., 515; *Shamp v. Meyer*, 20 Id., 223; *Klapworth v. Dressler*, 78 Am. Dec. [N. J.], 83, 84; Devlin, Deeds, sec. 1078; Cooley, Taxation, 542; Pom., Eq. Jur., sec. 804; *Forgy v. Merriman*, 14 Neb., 514; *Bond v. Dolby*, 17 Id., 491; *Kruger v. Harvesting Co.*, 9 Id., 533.

MAXWELL, J.

On the 9th day of November, 1886, one Ross Gamble recovered judgment against E. M. Cunningham for \$340 and costs, and on the 8th day of July, 1887, a transcript of said judgment was filed in the office of the clerk of the district court of Buffalo county.

On the 15th day of July, 1888, and for several years prior thereto, — Cunningham, the judgment debtor, owned lots 253-4, southwest quarter of the school section addition to the city of Kearney, Buffalo county, and occupied them with his family as a homestead.

On the said 15th day of July, 1888, he sold the property in question to one Tillotson. At the time he sold the property to Tillotson there was a mortgage on it for \$1,600, that had existed for some time, and Cunningham's

interest in said property over and above the amount of the said mortgage was not to exceed the sum of \$1,000.

The petition further states that on or about the 15th day of February, 1888, the substituted plaintiff herein, James W. Comnock, purchased this property of R. A. Moore, and that on the 24th day of December, 1888, there was an execution issued upon the said judgment before referred to, and the lands above described were levied upon by John Wilson, sheriff of Buffalo county, and defendant in error.

On the 19th day of January, 1889, R. A. Moore, who was at that time the owner of the property, brought this action in the district court of Buffalo county, restraining the defendant, the sheriff of said county, from selling the said property, and alleging, among other things, that at the time it was transferred from Cunningham to Tillotson it was the homestead of Cunningham, and that the judgment was not a valid lien thereon.

After the suit had been commenced by Moore, and before the trial of the cause, Moore sold his interest in the property to the substituted plaintiff, James W. Comnock, said sale being made on the 12th day of February, 1889, and on the 17th of March, 1890, before the cause was tried, Comnock filed his substituted petition in the district court, alleging that he was the real party in interest and asking to be substituted plaintiff in the place of R. A. Moore.

To the substituted petition of the plaintiff Comnock the defendants John Wilson and Hiram Hull filed their answer, setting up that the said Tillotson, at the time he bought this property from Cunningham, agreed to pay the judgment in question as a part of the consideration of said purchase.

3d. Admitting that the said defendants E. M. Cunningham and Maggie Cunningham are husband and wife and occupied said lands as a homestead, and alleging that said

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mortgage was paid or satisfied before the conveyance; and that said property was in value about \$4,000, and that in any event neither the said Cunningham nor his wife ever claimed said property as exempt from said judgment and made provision for the payment thereof.

Upon the issues thus presented the case was tried in the district court and a decree rendered for the defendant as follows:

"Now, on this second day of May, 1890, this cause coming on to be heard before F. G. Hamer, one of the judges of the district court, and after hearing the testimony of sundry witnesses and the argument of counsel, the court finds the following:

"That Cunningham's grantee, Tillotson, agreed to consider the claim as a lien against the premises, and reserved the money from Cunningham of the purchase price to pay it; that the plaintiff R. A. Moore received a conveyance from Tillotson and wife with a full knowledge of Tillotson's agreement to treat the claim as a valid lien and to pay it, and that the money to pay the claim had been received by Tillotson from Cunningham at the time of Tillotson's purchase, and that Moore purchased the premises from Tillotson and reserved out of the purchase price agreed upon between him and Tillotson, enough to pay the claim in full. If the court should determine that the claim was a valid lien, and that, under the agreement between Tillotson and Moore, Moore was permitted to beat the lien if he could, and was to have the benefit of such results if successful by litigation or otherwise, and that the substituted plaintiff, Comnock, became the real party in interest under a good and sufficient conveyance from the original plaintiff, Moore, and that he is properly chargeable with knowledge of all the facts, and became a substituted party plaintiff with all the rights of the original plaintiff, Moore, and with no other and greater rights, that the judgment under the law was not a legal lien

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against the premises at the time they were sold by Cunningham and his grantee, Tillotson, with a full knowledge of the said equitable lien, and that he and his grantee, Comstock, are each equitably bound to pay and satisfy said equitable lien. The court therefore finds that the judgment described is, between the parties to this case, a valid, equitable lien against the premises."

The action was dismissed for want of equity.

The testimony shows that Tillotson, in purchasing the lots in question, as a part of the consideration agreed to pay the judgments in question, and that Moore purchased from him with knowledge of that fact. It is true that Moore purchased with the agreement that he should not pay the judgments unless he was compelled to do so. It seems to have been supposed that the question of the validity of the lien of judgment would be inquired into, and if found to be invalid, no liability would attach to the purchaser. This is not a case where the owner of the homestead claims that it is exempt. He did not claim such exemption, but expressly stipulated that the amount of the judgment should be paid as a part of the purchase price.

The amount of this judgment was thereupon deducted and the former owner has no interest in preserving the homestead. His interest lies in requiring the purchasers to carry out their promise, so that the debt may be paid, and to be freed from liability thereon. It is very evident that a third party, having no interest in privity with him, can plead the homestead character of the property to prevent its application to the payment of the debt. So far as Comstock is concerned he purchased pending the litigation, and takes only the rights of Moore.

There is no equity in the petition and the judgment is

AFFIRMED.

THE other judges concur.

JACOB ZIMMERMAN ET AL., APPELLANTS, V. COUNTY
OF KEARNEY ET AL., APPELLEES.

[FILED JANUARY 4, 1892.]

Roads: EMINENT DOMAIN: COMPENSATION. Before a county can appropriate lands to public use for a public road it must provide for the payment of damages for the right of way either by the appropriation of money from the proper fund for that purpose, or the levy of sufficient taxes to pay the damages upon which a warrant may be drawn. In either case the compensation must be sure, and the land-owner may enjoin the use of his property by the public until such compensation is made.

APPEAL from the district court for Kearney county.
Heard below before GASLIN, J.

L. W. Hague, and *Leese & Stewart*, for appellants, cited, contending that compensation should precede or accompany appropriation: *Brady v. Bronson*, 45 Cal., 643; *Sage v. Brooklyn*, 89 N. Y., 189; *Chapman v. Gate*, 54 Id., 146; *Mills*, Eminent Dom. [2d Ed.], sec. 126; *Keene v. Bristol*, 26 Pa. St., 46.

J. N. Wolff, *contra*, cited: *Chapman v. Gates*, 54 N. Y., 132; *Sage v. Brooklyn*, 89 Id., 196; *Smeaton v. Martin*, 57 Wis., 364; *Woodruff v. Glendale*, 26 Minn., 78; *Com'rs v. Bowie*, 34 Ala., 461; *Cooley*, Const. Lim., 560; *R. Co. v. Fink*, 18 Neb., 86.

MAXWELL, J.

The appellants are the owners of certain real estate in road districts numbers 13 and 20, in Kearney county. That county now is, and for some years has been, under township organization. Some time prior to the commencement of this action the board of supervisors of that county ordered certain section lines in said road districts, along

33	620
42	279
33	620
49	668
51	739
55	4

which appellants' land lay, to be opened and worked as public roads. Appraisers were appointed and the damage of appellants assessed. The county board allowed but one per cent on the dollar of the amount of damages assessed by the appraisers.

From this order the appellants appealed to the district court. Upon the trial of these appeals the appellants' damage was found and determined to be certain specified sums, amounting in the aggregate to \$960, the following being the finding and judgment of the court in each case: "The amount found due as damages is ordered to be entered of record, and the amount ascertained to be certified pursuant to the provisions of section 42, chapter 78, Statutes of Nebraska."

These allowances were, pursuant to the above order, certified to the county board for further determination. The county board refused to pay the damages or make any provision for the payment of the same, except to certify the action of the district court to the road overseers of the proper road districts of Newark township.

This action was commenced for the purpose of restraining the county authorities from opening such roads and appropriating the land of appellants therefor until said damages were paid. A temporary injunction was granted as prayed for, issue was joined and trial had upon an agreed statement of facts. Among other things it was stipulated and agreed as follows, viz.: "That there is no money in the hands of the overseers of said road districts, nor in the road fund of the township treasury, nor in the road fund of the county treasury, due to said Newark township or the road overseers therein, and that no levies have ever been made to provide funds for the payment of said damages by either the township in which said roads are located, nor by the county of Kearney, the said county denying any and all liability for the payment for said roads out of county funds. The total assessed valuation of all property, real

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and personal, in said Newark township is about \$79,000. On the trial the court found for the defendants, dissolved the injunction, and dismissed the action.

Sec. 9, chapter 78, Compiled Statutes, provides that "after a general examination, if he shall not be in favor of establishing the proposed road, he will so report, and no further proceedings shall be had on that petition."

Section 100 provides: "When it shall be necessary to build, construct, or repair any bridge, or road, in any town, which would be an unreasonable burden to the same, the cost of which will be more than can be raised in one year, by ordinary road taxes, in such town, the town board shall present a petition to the county board of the county in which such town is situated, praying for an appropriation from the county treasury to aid in building, constructing, or repairing of such bridge or road, and such county board may (a majority of all the members elect voting for the same) make an appropriation of so much for that purpose as in their judgment the nature of the case requires and the funds of the county will justify; said appropriation to be expended under the supervision of an authorized agent or agents of the county, if the county board shall so order. In such case, where the county grants aid as aforesaid, the contract shall be let by the town board, under the provisions of sections 83, 84, and 85."

It is conceded that no attempt has been made to levy taxes to pay the damages in question, nor is it proposed to levy any for that purpose. If we understand the position of the defendant in error it is that the plaintiff must give up his land and take the chances of recovering payment therefor. This is not the law. The rule as stated in *R. V. R. Co. v. Fink*, 18 Neb., 82, is applicable in case of a municipal corporation, with this exception, that where the damages have been allowed and taxes levied to pay the same so that warrant may be drawn thereon, the levy constitutes a fund that is available to the land-owner and the

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property may be appropriated therefor. In other words, the proper authorities must be able to deliver to him a warrant drawn upon the proper levy before the public can appropriate his property to its use. This is the means by which public corporations, like counties, townships, etc., effect payment.

There must be an absolute provision for payment, however, or the property cannot be appropriated. Here there is no such provision, and the land-owner may enjoin the proceedings.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

VILLAGE OF HARTINGTON, APPELLEE, V. LUGE ET
AL., APPELLANTS.

[FILED JANUARY 4, 1892.]

1. **Municipal Corporations: ANNEXING TERRITORY.** In an action to annex certain territory to a village it must appear from the facts stated in the petition that some portion of the territory sought to be annexed will be benefited from the annexation, or that justice and equity require its annexation, and the particular facts showing such benefits, or the justice and equity of the relief sought, must be alleged.
2. ———: ———. As ordinarily the territory of a municipal corporation is subdivided into lots and blocks, and the residents therein do not depend on the cultivation of the soil for a livelihood, it is not the policy of the law to annex large tracts of agricultural lands to a village or city unless, under the circumstances, such lands should be subdivided and sold as village or city lots.

APPEAL from the district court for Cedar county. Heard below before NORRIS, J.

33	623
348	561
33	623
55	740

J. M. Cleland, H. A. Miller, W. C. Miller, and Hugh Roberts (Davis, Gantt & Keatley, of counsel), for appellants.

Wilbur F. Bryant, contra.

MAXWELL, J.

The plaintiff filed a petition against defendants as follows:

"The plaintiff for cause of action alleges:

"1st. That it is a corporation existing under the laws of the state of Nebraska and lying and being in section 36, township 31 north, of range 1 east, in said county, and desires to annex to its corporate limits the contiguous territory hereinafter described, and that for the purpose of such annexation of such territory the trustees of said corporation, plaintiff herein, did, on the 14th day of January, A. D. 1887, at a special meeting of said trustees held in said village of Hartington, vote upon the question of such annexation of such contiguous territory, and a resolution to annex such territory, to-wit, the west half of said section 36 and the west half of the east half of said section 36, T. 31 N., R. 1 E., not now included within the corporate limits of the said village of Hartington, was adopted by a two-thirds vote of all the members elect of such board of trustees.

"2d. The said plaintiff further shows and represents unto your honor that the defendants, Henry Luge, M. E. Luge, E. L. Dimick, H. A. Moore, T. L. Curris, Albert Street, George F. Scoville, Mrs. Letta Thomas, T. G. Thomas, August Lubeley, the Chicago, St. Paul, Minneapolis Omaha Railway Company, and the Northern Nebraska Land Improvement Company are the only owners of said territory, and the only owners of said territory. That an accurate map of the same, showing the subdivisions of said territory, together with its relative positions of such

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said village of Hartington, is hereto attached, marked exhibit 'A,' and prayed to be taken as a part of this petition.

"3d. The plaintiff further says that for the purpose of protection from fire, preserving health, order, cleanliness, of said village, and for the purpose of helping to raise the revenue or taxes to help defray the expenses of said village, would in justice and equity require the annexation of said territory to said village.

"4th. The plaintiff further shows unto your honor that other material benefit and advantages, besides those mentioned in preceding paragraph three, will be derived from such annexation by reason of said territory lying across and obstructing the approach and egress of the public and the citizens of said village to and from the said village of Hartington to the public highways adjacent to said territory, therefore, for the purpose of acquiring such benefit and equity, the board of trustees of said village of Hartington, L. H. Monroe, P. A. Van Dorn, G. McGregor, D. C. Clark, did, on Friday, January 14, 1887, at a special meeting, by a two-thirds vote, adopt the resolution for such annexation which is in words and figures following, to-wit: 'Special meeting of the board of trustees of the village of Hartington, held at their office in the village of Hartington on Friday, January 14, 1887, after due notice of the same, and the purpose being first given to each member of the board at the proper time and place aforesaid, the board of trustees of the village of Hartington met in special session as aforesaid, the following members of the board being present: L. H. Monroe, chairman; P. A. Van Dorn, G. McGregor, D. C. Clark, and the clerk thereof, Chas. Plumbleigh. The object and purpose of said meeting was called for the annexation of contiguous territory of the corporate limits of the village of Hartington. After discussion of the object of the call the following preamble and resolution was adopted:

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“Whereas, owing to the limited amount of territory now included in the incorporation of the village of Hartington it is adopted by the board of trustees of said village that justice and equity demand the extension of said incorporation; therefore, *be it resolved*, by the board of trustees of the village of Hartington in special session that the following territory be annexed to the present incorporation of said village described as follows, to-wit: All of that portion of land or territory lying and being in the west half of the east half of section 36, township 31 north, of range 1 east, and now not included in the present corporate limits of said village of Hartington.’

“Said D. C. Clark moved the adoption of the said resolution, which motion was seconded by said G. McGregor, whereupon the roll was called and voted as follows: Ayes, L. H. Monroe, P. A. Van Dorn, G. McGregor, D. C. Clark, being the unanimous vote of all the members of the board in favor of the adoption of said resolution. Charles Plumbleigh, clerk of the board.

“The plaintiff further states that part of said territory has been subdivided into lots, blocks, streets, and alleys and platted by the defendant, Northern Nebraska Land & Improvement Company; that a part has been subdivided into small portions and sold to the owners, other defendants. Wherefore plaintiff prays for the annexation of such aforesaid territory, and a copy of the decree of said court duly certified under the seal thereof, together with a plat of the territory, with a proper description thereof, so be decreed to be annexed, showing the same subdivided as shown by the plat hereto annexed, marked exhibit ‘A,’ shall be filed and recorded in the office of the county clerk, of said county, in the proper records of said county clerk’s office, and plaintiff’s costs.”

The answer of the defendants consists of certain specific denials and an allegation of want of benefit to the defendants. On the trial of the cause the court made the following findings:

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"This cause coming on to be heard upon the petition, answer of the defendants, the Northern Nebraska Land & Improvement Company and August Lubely, was submitted to the court, in consideration whereof the court finds that the village board of plaintiff has heretofore adopted a resolution to annex the territory described in the petition by a two-thirds vote of all the members of said board; and the court further finds that such of said territory as is hereinafter described, will receive material benefits by its annexation to said village of Hartington, and that justice and equity therefore require the annexation of that portion of said territory hereinafter described, to-wit: All of the west half of section 36, township 31, range 1 east, excepting the south half of the southwest quarter of said section 36, township 31, range 1 east; also all that portion of the west half of the east half of said section 31, township 31, range 1 east, lying west of the east boundary line of the present corporate limits of plaintiff, and the prolongation of said line, excepting the southwest quarter of said section 36, township 31, range 1 east, all in Cedar county, Nebraska."

The court thereupon rendered judgment accordingly.

The statute provides: "When any city or village shall desire to annex to its corporate limits any contiguous territory, whether such territory be in fact subdivided into tracts or parcels of ten acres or less, or be not so subdivided, the council or board of trustees of said corporation shall vote upon the question of such annexation, and if a resolution to annex such territory, describing the same in general terms, be adopted by two-thirds vote of all the members elect of such council or board of trustees, said resolution, and the vote thereon, shall be spread upon the records of said council or board. Said city or village may thereupon present to the district court of the county in which such such territory lies, a petition praying for the annexation of such territory, together with an accurate plat or map of

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the same, showing the subdivisions of said territory, if it be so subdivided, and its relative position to such city or village; and such petition shall set forth the resolution of said council or board of trustees for annexation of the same, and the vote thereon, and also the names of the various owners of said territory, if there be more than one such owner, and shall also set forth the material benefits and advantages to be derived from such annexation. A notice of the filing of said petition shall be served upon the owner or owners of said adjacent territory in the same manner as a summons in a civil action.

* * * Issues shall be joined and the cause tried in the same manner, as nearly as may be, as provided for trial of causes under the Code of Civil Procedure, except that no judgment for costs shall be rendered against any defendant who does not make any defense. If the court find the allegations of the petition to be true, and that such territory, or any part thereof, would receive material benefit by its annexation to such corporation, or that justice and equity require such annexation of said territory, or any part thereof, a decree shall be entered accordingly, and a copy of the decree of said court duly certified under the seal thereof, together with a plat of the territory, with a proper description thereof so decreed to be annexed; and in case the same is already subdivided, showing the same to be subdivided into blocks and lots to correspond as near as may be with the fact, and as near as may be with the lots, blocks, and streets of the adjacent city or village, and corresponding as near as may be to the provisions of said act, under the title of 'City and village plats,' shall be filed and recorded in the office of the county clerk or recorder of the county in which such territory lies; and from the time of filing such decree and plat the territory therein described shall be included in and become a part of such city or village, and the inhabitants thereof shall receive the benefits of and be subject to the ordinances and regulations

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of such city or village; *Provided*, That appeals may be taken from the proceedings aforesaid in the district court, as in other civil cases; but notice of appeal must be given immediately on the entering of the decree in said district court, and the filing of the said decree and plat in the county clerk's office shall be stayed to abide the event of such appeal, and in case such appeal be not perfected, said corporation may file said decree and plat as hereinbefore provided for, without being prejudiced by lapse of time. On the filing of such decree and plat the council or board of trustees shall pass an ordinance declaring such territory to be annexed to such city or village, and extending the corporate limits thereof accordingly, and file a certified copy of the same in the clerk's office."

It will be seen that to justify the annexation of territory it must appear that such territory, or some part, would receive material benefit from the annexation, or that justice and equity require such annexation. Unless one of these conditions exist, there is no authority in a village board or the district court to annex territory. The facts stated in the petition do not bring the case within the provisions of the statute. It does not appear that the property sought to be annexed would be benefited in any manner whatever, nor that justice and equity require such annexation. The principal benefit would be to the village by adding to the taxable property therein, but this of itself is not sufficient. If this action could be sustained upon the facts pleaded and prayed, then a village might annex a whole township or county, as such annexation could be placed upon the same grounds as it is sought to predicate this action upon. This cannot be permitted. In this connection it is unnecessary to decide just what facts will justify the annexation of territory to a village. Each case must depend to some extent upon its own circumstances, but in all cases there must be a statement of facts showing either a benefit to the territory annexed or that in justice it should be a part of the village.

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It is not the policy of the law to bring large tracts of agricultural lands within a municipal corporation. In fact, there is an inconsistency in doing so. The territory of a municipal corporation is ordinarily subdivided into lots and blocks, and the residents thereon are not supposed to obtain a livelihood by the cultivation of the soil. Where it is necessary, therefore, to extend the village limits to obtain more lots or land that should be divided into lots, an action of this kind may be sustained, but it cannot be sustained unless the statutory grounds exist. It follows that the judgment of the district court as to all the lands not subdivided into lots must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

F. H. SAWYER v. R. H. SWEET.

[FILED JANUARY 4, 1892.]

1. **Elections: CONTEST: TIME OF FILING COMPLAINT.** In a contest of election for a county office the complaint may be filed at any time within twenty days after the votes of the county are canvassed. The county clerk is required, with two disinterested electors of the county, to canvass the votes within six days after the closing of the polls.
2. ———: ———: ———. Where neither the pleading nor proof shows an earlier date, the twenty days in which to file a complaint in the county court will not commence until the expiration of the time limited in which the canvass may be made.
3. **Appeal: REVERSAL OF JUDGMENT ON PLEADINGS.** Where a case is decided in the county court on the pleadings alone, the district court, on reversing the case, should remand it for trial on its merits.

ERROR to the district court for Loup county. Tried below before HARRISON, J.

A. S. Moon, and *C. I. Bragg*, for plaintiff in error, cited: *Skerrett's Case*, Brightley's Lead. Cas., 320; *B. & M. R. Co. v. Young Bear*, 17 Neb., 670; *B. & M. R. Co. v. Kearney Co.*, Id., 516; *McCreary*, Elections [3d Ed.], 260; *Nuckolls v. Irwin*, 2 Neb., 65; *Horn v. Miller*, 20 Id., 104; *Smiley v. Sampson*, 1 Id., 70; *Morrill v. Taylor*, 6 Id., 242; *S. C. & P. R. Co. v. Washington Co.*, 3 Id., 41; *Massie's Heirs v. Donaldson*, 8 O., 377; *Dooddy v. Vaughn*, 7 Id., 32; *Brondberg v. Babbott*, 14 Id., 519; *U. P. R. Co. v. Ogilvy*, 18 Neb., 639; *Torbet v. Coffin*, 6 O., 34; *McClarey v. McLain*, 2 O. St., 370; *Evans v. Iles*, 7 Id., 236; *Rohn v. Dunbar*, 13 Id., 572; *Hamilton v. Merrill*, 37 Id., 684; *Edwards v. Knight*, 8 O., 875; *Lumpkin v. Collier*, 69 Mo., 170; *Scoville v. Glasner*, 79 Id., 449; *Smith v. Gould*, 61 Wis., 31; *Mayer v. Woodbury*, 14 Ia., 57; *Mann v. Cassidy*, 1 Brews. [Pa.], 32; *Thompson v. Ewing*, Id., 97; *Am. & Eng. Ency. Law* [Ed. 1888], 407; *Merrill v. Wedgwood*, 25 Neb., 280.

E. J. Clements, and *C. A. Munn*, *contra*, cited: 6 *Am. & Eng. Ency. Law*, 414; *Knox Co. v. Davis*, 63 Ill., 415; *Ellis v. Reddin*, 12 Kan., 307; *Miller v. Bogart*, 19 Id., 118; *Buckland v. Goit*, 23 Id., 327; *Burley v. State*, 1 Neb., 394; *Mills v. Miller*, 2 Id., 315; *Hurford v. Baker*, 17 Id., 443; *Sherwin v. O'Connor*, 23 Id., 222; *Follett v. Delow*, 3 Bartlett's Contested Election Cases, 116; *Hull v. Miller*, 4 Neb., 503; *State v. Peniston*, 11 Id., 100; *Burke v. Perry*, 26 Id., 414; *Preston v. Culbertson*, 58 Cal., 207; *Paine*, Elections, sec. 765; *State v. Minnick*, 15 Ia., 123; *Davis v. Best*, 2 Id., 96; *Campbell v. Crone*, 10 Neb., 573; *Berrier v. Moorhead*, 22 Id., 691; *Freeman v. Webb*, 21 Id., 160; *McKeighan v. Hopkins*, 19 Id., 34; *K. P. R. Co. v. Salmon*, 14 Kan., 513; *Hale v. Wigton*, 20 Neb., 83; *Todd*

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v. Cass Co., 30 Id., 823; *Brown v. McCollum*, 41 N. W. Rep. [Ia.], 197; *Heyfron v. Mahony*, 24 Pac. Rep. [Mont.], 93; *Bell v. Templin*, 26 Neb., 249; *Steinkraus v. Hurlbert*, 20 Id., 519.

MAXWELL, J.

On the 27th day of November, 1889, the defendant in error filed in the county court of Loup county a petition alleging that at an election held on the 5th day of November, 1889, the plaintiff in error had received for the office of county clerk of said Loup county illegal votes, and that legal votes had been rejected for defendant in error for the same office sufficient to change the result; praying for ouster, and that defendant in error be declared duly elected to said office. The petition alleged that the incumbent, plaintiff in error, received one hundred and eighty-one votes and the contestant one hundred and seventy-nine. It is further alleged that there were five illegal votes cast and counted for plaintiff in error in Little York precinct by the following persons: (naming them). Afterwards, on the 31st day of December, 1889, and before the return day of the summons, defendant in error filed an amended petition giving plaintiff in error notice thereof, with the same allegations as the original, except that in Little York precinct six illegal votes were cast for plaintiff in error by the following persons: (naming two more than in the original petition and omitting one).

This amended petition was stricken from the files on motion of plaintiff in error, whereupon defendant filed second amended petition setting up the same facts as first amended petition; whereupon, on motion of plaintiff in error, the new matter in regard to the illegal votes of (certain parties named) was stricken out. The defendant in error filed other amended petitions, substantially the same as the second amended complaint, which were disposed of the same as the second, that is, by striking out the new matter.

Afterwards this plaintiff answered and defendant replied. The case was continued to the next term upon application of defendant in error. Whereupon, at the next term, defendant in error filed a motion to be allowed to file an amended petition substantially the same as those filed before, which was overruled, the same motion having been before the court and overruled previously. The defendant in error refused to produce any evidence, whereupon the case was dismissed at cost of defendant in error. The defendant in error thereupon commenced proceedings in error in the district court of Loup county to obtain the reversal of the judgment of the county court. Upon the hearing of said cause the district court reversed the judgment of the county court and remanded the cause back to the county court for trial, taxing the costs up to time of judgment to the plaintiff in error. The first objection of the plaintiff in error is that the petition, being filed on November 27, or twenty-two days after the election, that the court had no jurisdiction of the case.

Sec. 46 of chapter 26, Compiled Statutes, provides that "Upon the reception of the returns of each election precinct, township, or ward by the county clerk, directed by him as hereinbefore provided, and within *six days* after the closing of the polls, he, together with two disinterested electors of the county, to be chosen by himself, shall open the poll books and from the returns therein make abstracts of the votes cast in the following manner: of votes for governor, lieutenant governor, members of congress, secretary of state, auditor of public accounts, state treasurer, attorney general, state superintendent of public instruction, commissioner of public lands and buildings, and district attorneys, on one sheet; of votes for presidential electors on another sheet; of votes expressing the choice of electors for United States senator on another sheet; of votes for judges of the supreme and district courts, and regents of the university, on another sheet; of votes for members

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of the legislature from the county alone, on another sheet; of votes for members of the legislature by districts comprising more than one county, on another sheet; and of votes for county, precinct, and township officers, on another sheet. The foregoing abstracts shall be preserved by the county clerk in his office."

The canvass of the votes in a county is to be made within six days after the closing of the polls. In the absence of any showing to the contrary, it will be presumed that the official did his duty, and had the votes canvassed within the time named. There is no presumption, however, that he did this on the first, second, or other day after election. That is a matter of pleading and proof. In the absence of either, the statute would not begin to run until the expiration of the time limited, or the six days. This being so, the petition was filed in sufficient time, and the county court had jurisdiction. Both parties distinguished themselves by the number of motions filed, and perhaps it is not a matter of surprise that the county judge, who seems to have been anxious to do his duty, erred in ruling upon some of them. A case of this kind is like any other, to be tried upon the merits to carry out, if possible, the intention of the lawful electors. No testimony was taken in the county court, because apparently that court had so bound itself up by its own rulings that but little testimony could be introduced. The district court, therefore, properly reversed the judgment of the county court, and remanded the cause for trial. There is no error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

L. S. WINTERS V. J. L. MEANS.

38	636
648	335

[FILED JANUARY 4, 1892.]

Practice: PLEADING. In an action to enjoin a judgment the defendant filed an answer asking affirmative relief, whereupon the plaintiff dismissed his petition without prejudice, and asked leave to file a reply in the nature of an answer to the defendant's answer. This was denied, and judgment entered in favor of the defendant by default. *Held*, That the plaintiff should have been permitted to reply.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Dilworth, Smith & Dilworth, and *Marquett, Dewees & Hall*, for plaintiff in error.

Abbott & Caldwell, contra.

MAXWELL, J.

An amended petition was filed in this case as follows:

"The plaintiff complains of the defendant and states: That on the 22d day of June, 1880, the defendant recovered a pretended judgment in the district court of Adams county, Neb., against William L. Smith & Co., consisting of William L. Smith, John J. Worswick, Charles Wells, George Wells, Henry P. Handy, and this plaintiff, and plaintiff further alleges that this suit was brought by the said Jno. L. Means, defendant, against said parties alleged by him to compose the firm of William L. Smith & Co., and a large number of other persons, and plaintiff alleges there never was any summons served upon him in said suit, and that he never appeared in said suit by attorney or otherwise, and that he never authorized any one in his behalf or for him to appear in said court.

"Plaintiff further alleges that he was never in any way

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indebted to the defendant, or concerned or interested in the transaction with the members of said firm of William L. Smith & Co., in the claim on which said action was founded. And plaintiff alleges that long previous to the time at which the defendant had done anything under the claim stated in his cause of action, upon which said judgment was founded, and long previous to the time the defendant had anything to do under the contract with William L. Smith & Co., this plaintiff, with the knowledge and consent of the defendant, John L. Means, had withdrawn from and severed his connection with the said William L. Smith & Co., and one John J. Worswick had, with the knowledge and consent of the said John L. Means, purchased all the interest of the said plaintiff, with the understanding that the said John J. Worswick should assume all responsibility of the plaintiff in the firm of William L. Smith & Co., and defendant alleges that at the time said defendant brought his suit upon which judgment was founded, more than four years had elapsed since the cause of action arose to the defendant, and before any of said parties whom said defendant alleged composed the firm of William L. Smith & Co. were summoned or appeared in court, either by themselves or otherwise, and that said claim was thereby outlawed before the bringing of said suit, and before any action was taken in said suit by the defendant against any of said parties, and more particularly against this plaintiff, and plaintiff alleges that none of said parties, to-wit, William L. Smith, John J. Worswick, Charles Wells, George Wells, Henry P. Handy, or this plaintiff, ever appeared in said suit, either in person or by attorney, and plaintiff further says that none of said parties against whom said judgment was rendered ever authorized any attorney or any other person to appear for them or either of them, and plaintiff alleges that the defendant had full knowledge that none of said defendants ever appeared in said suit.

"And plaintiff alleges that the pretended appearance of Ash & Schoefield for the firm of William L. Smith & Co. was unauthorized, and that none of the members of the firm of William L. Smith & Co. ever had any authority to employ said Ash & Schoefield for said firm, and never did employ said Ash & Schoefield either for themselves, or for the firm of William L. Smith & Co., and the appearance of said attorneys was upon the request of the said defendant and not on the part of any of the said firm of William L. Smith & Co., or this plaintiff.

"Plaintiff further avers that in the cause of action brought by said defendant he alleges that the firm of W. L. Smith & Co. became indebted to him and that the claim set out in his petition was a claim against said partnership of W. L. Smith & Co., and there never was any service upon the said W. L. Smith & Co., or upon any of its officers or managers, as required by law, and the court rendering said judgment had no jurisdiction to render a judgment against William L. Smith & Co.

"Plaintiff further alleges that said defendant is now seeking to, and threatening to, enforce said judgment against the property of this plaintiff. Wherefore plaintiff prays that said judgment may be vacated and set aside so far as the same relates to him individually, and that the defendant may be restrained from collecting or enforcing said judgment, and for such other and further relief as may be just and equitable in the premises."

A motion was made by the defendant to strike out certain portions of the petition. What ruling was had on this motion we are unable to determine from the record.

The defendant afterwards filed an answer as follows :

"Comes now the said John L. Means, defendant, and answering the petition of the said plaintiff admits that on or about the 22d day of June, A. D. 1880, he, the said defendant, recovered a judgment in the district court of said Adams county in a certain action then pending in said

Winters v. Means.

court, wherein the said John L. Means was plaintiff and the firm of W. L. Smith & Co., consisting of W. L. Smith, Leroy S. Winters, John J. Worswick, Henry P. Handy, Charles Wells, and George Wells were defendants, in the sum of \$22,691, his debt and damages, and costs taxed to the sum of \$39, which said suit is the same suit and proceeding referred to in said plaintiff's petition herein.

"Said defendant denies that said Leroy S. Winters was not a member of said firm of W. L. Smith & Co. at the time of the contracting of the obligation sued on, or at the time of the commencement of said suit as alleged in said plaintiff's petition; denies that said Leroy S. Winters had no notice of the pendency of said suit; denies that said Leroy S. Winters did not appear in said suit; denies that said judgment is unjust or that at the date of the rendition thereof said Leroy S. Winters had any defense thereto; denies that said Leroy S. Winters is not indebted to this plaintiff.

"2d. Said defendant, further answering the petition of said plaintiff, and by way of a cross-petition, alleges that said plaintiff Leroy S. Winters is the same Leroy S. Winters who was a member of the said firm of W. L. Smith & Co., and that the judgment heretofore referred to against said firm of W. L. Smith & Co. is now in full force and wholly unpaid, unsatisfied, and unreversed. That he caused executions to be issued from time to time, and which said executions have been returned unpaid and unsatisfied for want of property wherewith to satisfy the same, and that the said firm of W. L. Smith & Co. is wholly insolvent and has been insolvent and unable to pay its former debts ever since the rendition thereof. Plaintiff further alleges that the said Leroy S. Winters knew of the pendency of said suit and employed attorneys therein as well on his own behalf as on behalf of the firm of W. L. Smith & Co. That said judgment is a valid and subsisting obligation against the said Leroy S. Winters and against said W. L. Smith & Co.

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"Wherefore defendant prays that execution may be issued in said cause against the said Leroy S. Winters according to the statute in such cases made and provided, and for such other, further, and different relief as may be agreeable to equity and good conscience and the practice of this honorable court."

Upon the filing of the answer the plaintiff dismissed the action without prejudice, whereupon the defendant moved for judgment on the answer. The plaintiff then asked leave to file a reply in the nature of an answer to the defendant's answer. This the court denied and rendered judgment in favor of the defendant on the pleadings, and this is the error complained of. In this we think the court erred. The plaintiff should be permitted to plead and prove any fact tending to show that he is not liable on the defendant's demand. He must have a full and free opportunity to do this. The court will not condemn him unheard. It was the duty of the court, therefore, to sustain the application, and if issues of facts were presented, determine the same from the evidence in the case. There was no evidence offered, judgment being taken by default. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

DAVID BRUNCK V. CHARLES L. WOOD.

[FILED JANUARY 4, 1892.]

1. **County Court: APPEAL: TIME.** Judgment was rendered in a county court on the 29th of May, and a transcript for an appeal filed in the district court on the 27th of June following. *Held*, Filed within time.

Brunck v. Wood.

2. ———: CONTINUANCE. Where the transcript of the county judge shows a continuance to May 27, and a trial and verdict on May 29, it will be presumed that the trial began on May 27, and continued until May 29.

ERROR to the district court for Lincoln county. Tried below before CHURCH, J.

H. D. Rhea, for plaintiff in error.

Grimes & Wilcox, contra.

MAXWELL, J.

This action was brought by Wood against Brunck in the county court of Lincoln county. There was a trial to a jury which returned a verdict in favor of Wood. Brunck then appealed to the district court, where the appeal was dismissed upon the ground that the transcript had not been filed within thirty days from the date of judgment in the county court. From that judgment the case was brought into this court. It appears from the transcript that the action was begun on the 30th of March, 1889. Continuances were had until May 27, 1889. The transcript from that date is as follows:

"May 27th, 1889. This cause again came on for hearing and the defendant called a jury selected as follows:

"VENIRE FOR JURY.

"STATE OF NEBRASKA, }
LINCOLN COUNTY. } ss.

"The state of Nebraska to the sheriff or any constable of said county, greeting: You are hereby commanded to summon Frank Peale, Alex. Stewart, Jno. Holman, C. S. Clinton, A. S. Brown, H. Otten to appear before me at the county court room in said county and state on the 27th day of May, A. D. 1889, at 3 o'clock in the afternoon, to serve as jurors in a case pending before me, then and there to be tried, and this they shall in nowise omit,

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and have you then and there this writ, with your doings thereon.

"Given under my hand, this 27th day of May, 1889.

"[SEAL.]

J. J. O'ROURKE,

" *County Judge.*

"STATE OF NEBRASKA, }
LINCOLN COUNTY. }

"Received this venire for jury this 27th day of May, 1889, and as commanded, I on the same day and date served on H. Otten, C. S. Clinton, John Holman, A. S. Brown, and Alex. Stewart by reading same to them.

"Fees, service and return.....\$1 50

"Mileage 20

"\$1 70

"C. L. PATTERSON, *Constable.*

"Summons issued and delivered to C. L. Patterson, requiring the jury to appear at 3 o'clock P. M. to-day, to which time I adjourned the cause.

"May 29th, 1889, 3 o'clock P. M. The following jurors appeared: Frank Peale, C. S. Clinton, John Holman, H. Otten, Alexander Stewart, A. S. Brown being absent. The jury were then examined and sworn.

"Trial had; plaintiff called as witnesses Mrs. C. L. Wood, Fred Hanlan, and David Cash, who were examined and sworn, and the defendant called as witnesses W. H. Brunck, Mrs David Brunck, who were sworn and examined. The jury, having heard the evidence, and the arguments of the counsel, on the same day agree upon the following verdict:

* * * * *

"VERDICT OF JURY.

"THE STATE OF NEBRASKA, }
LINCOLN COUNTY. } ss.

"May term, A. D. 1889, to-wit, May 27, 1889.

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"CHAS. L. WOOD, Plaintiff, }
v.
DAVID BRUNCK, Defendant. }

"We, the jury in this case, being duly impaneled and sworn, do find and say that we find for the plaintiff, and assess his damages at \$50. F. PEAL, *Foreman*.

(Not filed.)

"It is therefore considered by me that the plaintiff recover from the defendant the sum of \$50 and his costs herein expended, taxed at \$17.35.

"J. J. O'ROURKE, *County Judge*."

There is also an affidavit of the attorney for the plaintiff in error that the judgment was rendered on the 29th of May, 1889, and this affidavit is not contradicted. The transcript was filed in the district court on the 27th day of June, 1889. The transcript thus is shown to have been filed within thirty days from the date of the rendition of judgment in county court. Some comment is made in the brief of the attorney for the defendant in error as to rendering of judgment on the 29th of May, it being assumed that the verdict was rendered on the 27th of May, 1889. No complaint is made of the want of jurisdiction of the county court. The judgment evidently is valid, unless reversed or modified in some of the modes provided by law. The trial probably begun on the 27th and continued until the 29th. But, however this may be, it is evident that a judgment was rendered on the 29th, the day to which the trial was continued, and the thirty days in which to file the transcript commenced at that time. The district court therefore erred in dismissing the appeal. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

LAURA VENEMAN V. ADDISON MCCURTAIN.

[FILED JANUARY 4, 1892.]

1. **Review.** AFFIDAVITS used on the hearing of a motion in the district court must be preserved in a bill of exceptions to be available in the supreme court.
2. **Jury: DELIBERATION: MISCONDUCT.** While a jury was deliberating upon a verdict one of the jurors handed a person outside of a window twenty-five cents, with the request that he would procure apples for the jury. The bystander thus addressed took the money, purchased apples, and on his own account also a quantity of cigars, and passed them in to the jury with the remark that these were — cigars, giving the name of defendant in the action, but immediately thereafter adding the name of the plaintiff, saying that the jury might consider them from either. *Held*, That the verdict be set aside; that the court would not permit a jury to be tampered with in this manner, and that prejudice would be presumed. *Held*, also, that upon the attention of the trial court being called to this infraction of duty by a bystander, that the offender should have been severely punished for contempt.
3. **Instructions: MUST BE READ TO THE JURY.** All instructions which are proper to be given to the jury should be read by the court, and if it was clearly shown that instructions asked on behalf of a party had been handed to the jury without reading, thus placing them under a cloud, the verdict against such party would be set aside.

ERROR to the district court for Phelps county. Tried below before GASLIN, J.

James I. Rhea, for plaintiff in error.

Hall & Patrick, and *S. A. Dravo*, contra.

MAXWELL, J.

This action was brought by the plaintiff against the defendant for breach of promise of marriage, and on the trial the jury returned a verdict for the defendant. Whereupon

the court overruled a motion for a new trial and dismissed the action.

A motion is now made to strike certain affidavits from the record because irregularly therein. No doubt by this is meant that such affidavits are not included in the bill of exceptions.

On examining the transcript we find that such is the case, and the motion, though not in proper form, will be sustained.

This court has many times held that affidavits or other evidence used on the hearing of a motion in the district court must be preserved in a bill of exceptions to be available in the supreme court. A number of affidavits are preserved in the bill of exceptions, from which it appears that while the jury were deliberating on a verdict one of the jurors handed a man named Breech twenty-five cents through a window and requested him to procure apples for the jury; that he took the money, secured the apples and returned them to the jury, and also procured a quantity of cigars and passed them to the jury with the remark, as stated by one witness, "Breech brought the said jury, which a portion of them received through a window from the outside of the court house, one lot of cigars which said Breech then stated they were McCurtain cigars, then afterwards stated that they could consider them as Laura Veneman cigars. I considered them as coming from the one presenting them." The other affidavits in the case show beyond question that these cigars were handed to the jury, the only dispute being as to what was said at the time they were delivered.

This court will not permit a jury to be tampered with in this manner. The party who thus undertook to furnish apples and cigars was guilty of contempt and should have been punished when the attention of the court was called to his conduct.

We do not know what the effect of such influence might

be. It is the duty of the jury to be governed entirely by the evidence and instructions of the court, and all communications by individual jurors or the jury as a whole with outside parties is calculated to obstruct the due administration of justice. In such case it is not necessary to show affirmatively that a party has been prejudiced, as such proof may be impossible to be obtained, but prejudice will be presumed and the verdict set aside.

It is assigned for error that the judge failed to read the instructions asked by the plaintiff. There is no evidence in support of this assignment except the affidavits which have been stricken from the record. If it was clearly shown that a court had refused to read instructions proper in themselves and which should be given, it would be good cause for the reversal of a judgment.

The court is not to discriminate between instructions as coming from the plaintiff or defendant so as to cast a cloud upon those given on behalf of either. Instructions are for the guidance of a jury—to enable them to arrive at a correct conclusion. Therefore, if instructions are proper in themselves and the court deem it necessary that they should be given, it is the duty of the judge to read them as the law applicable to a certain phase of the case.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

 First Natl. Bank of Hastings v. McAllister.

FIRST NATIONAL BANK OF HASTINGS V. JOHN MCALLISTER.

[FILED JANUARY 4, 1892.]

Negotiable Instruments: PROTEST: LAST DAY OF GRACE ON SUNDAY. Under the provisions of sec. 8, chap. 41, Compiled Statutes, legal holidays and Sundays are grouped together so far "as regards the presenting for payment or acceptance and the protesting and giving notice of the dishonor of bills of exchange, bank checks, or promissory notes," and where the third day of grace falls on Sunday, presentment or demand on the following Monday will be sufficient.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

J. B. Cessna, for plaintiff in error:

The statute allows "three days of grace," and this period cannot be lessened (as it would be here if presentment were required on the second day), because it is regulated by the law of the place of payment. (*Thorp v. Craig*, 10 Ia., 461; *Shelton v. Dustin*, 92 Ill., 49; 1 Randolph, Com. Paper, 2, 31; 2 Am. & Eng. Ency. of Law, 397.) Presentment before the last day of grace is premature (*Edgar v. Green*, 8 Ia., 393; *Griffin v. Goff*, 12 Johns. [N. Y.], 423; *McFarland v. Pico*, 8 Cal., 426; Parsons, Mercantile Law, 106); and will not authorize a protest (*Bank of Washington v. Tuflett*, 1 Peters [U. S.], 25; *Avry v. Stewart*, 2 Conn., 69). Sunday is a *dies non* and should be ignored. (*Post v. Garrow*, 18 Neb., 682; *Barrett v. Allen*, 10 Ohio, 426; *Kilgore v. Bulkey*, 14 Conn., 362; *Bank v. Barnum*, 49 N. Y., 279.) The rule here contended for is announced by this court in *State v. King*, 23 Neb., 546, and the only contrary statement produced is a mere suggestion of Judge Swan in his "Justice Treatise," p. 721.

J. R. Patrick, contra:

The common law, in a case of this kind, requires presentment and demand on the second day. (*Reed v. Wilson*, 12 Vr. [N. J.], 29; *Woods v. Corl*, 4 Met. [Mass.], 203; *Bussard v. Levering*, 6 Wheat. [U. S.], 102; *Routh v. Helm*, 6 How. [Miss.], 129; *Kuntz v. Temple*, 48 Mo., 75; *Cuyler v. Stevens*, 4 Wend. [N. Y.], 566; 1 Parsons, Bills and Notes, 402; *Farnum v. Fowle*, 7 Am. Dec. [Mass.], 35; *Sanders v. Ochiltree*, 30 Id. [Ala.], 551; *Sheldon v. Benham*, 40 Id. [N. Y.], 271; *Ransom v. Mack*, 38 Id., 602; 1 Daniels, Neg. Inst., secs. 465, 627; Story, Bills, 338; *Thornton v. Stoddert*, 1 Cranch [D. C.], 534; *Satter v. Burt*, 20 Wend. [N. Y.], 205; *Bank v. Varnum*, 49 N. Y., 279.) Our statute does not change but reaffirms the common law in this regard, and *State v. King*, 23 Neb., 546, while a *dictum*, clearly indicates that the common law prevails here. The Ohio statute is almost identical with ours, and Judge Swan's construction of the former ("Justice Treatise," p. 721) is authority.

MAXWELL, J.

The plaintiff in error brought an action against the defendant in error as indorser on a promissory note, it being alleged in the petition that the third day of grace was Sunday, and that demand of payment was made on the following Monday, and due notice thereof given the indorser. The court therefore held that the indorser was not liable and sustained the demurrer, and the plaintiff, not desiring to amend, the action was dismissed.

Section 1, chapter 41, Compiled Statutes, provides: "All bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money, certain and made payable to any person or order, or to any person or assigns, shall be negotiable by indorsement thereon, so as absolutely to transfer and vest the property thereof in each

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and every endorsee successively, but nothing in this section shall be construed to make negotiable any such bond, note, or bill of exchange, drawn payable to any person or persons alone, and not drawn payable to order, bearer, or assigns; *Provided*, That all such bonds, promissory notes, and bills of exchange made payable to bearer shall be transferable by delivery without indorsement thereon."

Section 3 provides: "All notes, bonds, or bills made negotiable by this chapter shall be entitled to three days' grace in the time of payment, and the demand of payment from the maker on the third day of grace or acceptance, if the instrument is a sight draft, and notice of non-payment, or non-acceptance thereof, to the indorser within a reasonable time, shall be adjudged due diligence, under the provisions of this chapter, unless the indorsement shall express in writing other conditions."

Section 8 declares that "The following days, to-wit: the first day of January, February 22, and the 22d of April, which shall be known as 'Arbor day,' the 25th day of December, the 30th of May, and July 4, and any day appointed or recommended by the governor of this state or the president of the United States, as a day of fast or thanksgiving, and when any one of these days shall occur on Sunday, then the Monday following shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks, or promissory notes, made after the passage of this act, be deemed public holidays and be treated and considered as is the first day of the week, commonly called Sunday; *Provided*, That when any one of these days shall occur on Monday, any bill of exchange, bank check, or promissory note made after the passage of this act, which, but for this act, would fall due and payable on such Monday, shall become due and payable on the day thereafter."

Sec. 9 makes the first Monday in September a public

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holiday to the same extent as the above named. It will be observed that in sec. 8 the 1st day of January, 22d of February, 22d of April, 30th of May, July 4, December 25, and by sec. 9, labor day, or the first Monday in September, of each year, together with any day appointed by the president of the United States, or governor of the state, as a fast or thanksgiving shall be a legal holiday, and when any of these days shall occur on Sunday they shall be treated and considered as is the "first day of the week, commonly called Sunday," and "the Monday following shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks, or promissory notes," etc. That all of these days including Sunday are embraced in the above section is evident when we consider the whole together.

For the purpose of protest of commercial paper a legal holiday is placed on a par with Sunday, and it is declared that demand on the following Monday shall be sufficient.

The language of the proviso is very broad. In other words, legal holidays for the purposes named are placed upon an equality with Sunday, and in either case where the third day of grace falls on Sunday, or a legal holiday, a presentment of demand of payment on the following day is sufficient. The court, therefore, erred in sustaining the demurrer.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

23	650
28	524
33	650
43	304

MARGARET WALKER ET AL. V. SAMUEL P. MORSE
ET AL.

[FILED JANUARY 4, 1892.]

1. **A Motion to Quash a Bill of Exceptions**, being a technical objection, must itself be free from fault; therefore where the grounds assigned are "because the same (the bill) was not made and signed as required by law," the motion should be overruled, unless there is a total want of some material requirement—such as the signature of the judge.
2. **Motions: MUST BE DEFINITE.** It is the duty of a party who asks relief by a motion to specifically point out what he desires.
3. **Attachment: REVIEW.** The statute allows the defeated party against whom an attachment has been sustained to have the attachment proceedings reviewed on error after the final judgment in the case is rendered.

ERROR to the district court for Custer county. Tried below before HAMER, J.

Henry M. Kidder, and Mason & Whedon, for plaintiffs in error.

Kirkpatrick & Holcomb, contra.

MAXWELL, J.

This action was brought in the county court of Custer county by the defendants in error against the plaintiffs in error to recover the sum of \$575. An attachment was issued against the property of the plaintiffs in error, who made a motion supported by affidavits to dissolve the same. This motion on the hearing was overruled and the attachment sustained, and twenty days given the plaintiffs in error to prepare a bill of exceptions. The bill was prepared and signed by the judge and filed in the district court, where, upon motion of the attorneys for the defend-

Walker v. Morse.

ants in error, it was stricken from the files. Final judgment was rendered February 16, 1889, and the attachment thereupon sustained. The certificate of the county judge to the bill, the motion to dismiss, and his ruling thereon, are as follows :

"STATE OF NEBRASKA, }
CUSTER COUNTY. }

"I, John Reese, county judge of Custer county, Nebraska, do hereby certify that the foregoing is a true and correct copy of all the evidence filed and considered in the hearing on motion to discharge the attachment in said cause, and I hereby allow the foregoing bill of exceptions.

"Dated this 8th day of April, 1889.

"[SEAL.]

JOHN REESE,

"County Judge."

The transcript was filed April 8, 1889. The motion is as follows: "The defendants move the court to strike from the files of this cause the pretended bill of exceptions, for the reason that the same is improperly filed in this action and because the same was not made and signed as required by law, and because same was made and filed in this action after the petition in error was filed and after summons in error was issued and returned, and because the same is not made a part of the transcript and record filed in this case." It will be observed that the motion on behalf of the defendants in error is very general in its terms. The grounds are, "That it was not made and signed as required by law."

In what respect there had been a failure to comply with the law we are not informed. This is a technical motion made upon technical grounds, and should itself be free from fault. It should specifically point out the defect complained of, and where it fails to do so it should be overruled, unless there is a total omission of some essential requirement of the law, such as the failure of the judge to sign the bill. Neither are the specific objections in the

Carson v. Solomon.

motion well taken. The law gives a party whose lien is divested twenty days after the order dissolving an attachment in which to file the transcript, etc., in the district court, and the fact that the different papers are filed on different days, so that all are filed within the time required, does not prejudice the adverse party. In this case the attachment was sustained, but the grounds therefor could be reviewed by ordinary proceedings in error after final judgment in the case. It is not the business of the court to search for causes to defeat an action for an alleged defect in the proceedings, but rather to sustain the same as far as possible in order than the merits of the controversy may be determined in that action. The court, therefore, erred in striking the bill of exceptions from the files, and as that lies at the foundation of the attachment proceedings which are sought to be reversed, the judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WASHINGTON I. CARSON V. SOLOMON & NATHAN.

[FILED JANUARY 4, 1892.]

Attachment: EVIDENCE. In an action of replevin brought by a purchaser of goods against the sheriff who had levied an attachment thereon at the suit of a creditor, *held*, that the evidence sustained the judgment of the court below that there was no intent to defraud creditors.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

Billings & Billings, and *W. C. Sloan*, for plaintiff in error.

F. B. Donisthorpe, *contra*.

MAXWELL, J.

This is an action of replevin brought by the defendants in error against the plaintiff in error in the district court of Fillmore county.

On the trial of the cause a jury was waived and the cause tried to the court, which found the issues in favor of the defendants in error and rendered judgment accordingly.

The proof tends to establish the following facts:

The defendants in error were creditors of the firm of Israel & Grenker, the latter firm doing business in Geneva, Fillmore county. On or about the 15th day of September, 1889, said Israel, of said firm of Israel & Grenker, was ordered by his physician to return to his former home if he denied to prolong his life. Acting under this advice he made arrangements to dispose of the business; his partner, Grenker, not having the cash to purchase Israel's interest, defendants in error, one of whom is a distant relative, entered into negotiations for the purchase. At this time one D. J. Spear had a chattel mortgage upon a certain part of the stock of goods belonging to said Israel Grenker, and he was notified of what was taking place, and said Israel Grenker separated said mortgaged goods from the balance, placing them on one side of the store occupied by them, and then told Mr. Spear that they could not pay him, but would give him a bill of sale of said goods so as to save the costs of foreclosing his mortgage. This offer Spear refused to accept. The defendants in error then took an invoice of the goods (except those included in the mortgage). The goods invoiced, as per the marks and figures on said goods, \$1,900. The damage to said goods, some being shelf-worn and colors faded, etc., was estimated, and

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the sum of \$1,300 was finally agreed upon as the price for said goods. A bill of sale was then given to defendant in error by said Israel & Grenker and was duly placed on file with the clerk of Fillmore county.

On the 19th day of September, 1889, defendant in error took possession of said goods, paying therefor the said sum of \$1,300.

After the transfer to the defendants in error Spear begun an action by attachment, and levied not only upon the goods mortgaged to him, but also upon the goods conveyed to the defendants in error, and the question now is as to the *bona fides* of the sale to the latter.

The proof tends to sustain the claim of the defendants in error. A sufficient reason is shown for the sale, and the defendants in error seem to have paid the full value of the stock, and there seems to have been no intention to defraud the creditors.

There is no error apparent in the proceedings and the judgment is

AFFIRMED.

THE other judges concur.

33	654
43	592
33	654
52	621

WILLIAM DEERING & Co. v. B. F. MILLER ET AL.

[FILED JANUARY 4, 1892.]

- 1. Chattel Mortgages: FAILURE TO RELEASE: DAMAGES.** In an action to recover \$50 for neglect of the agent of the mortgagee of a chattel mortgage to release the same the district court struck out all that part of the petition relating to the penalty, and the action thereupon proceeded as a common law action for actual damages, the question of the validity of the statute not being before the court. *Held*, That the testimony failed to show any legitimate actual damages, and that a judgment for \$50 could not be sustained.

Deering v. Miller.

2. ———: ———: ———. Where a chattel mortgage is paid in full it is the duty of the mortgagee or his agent to release the same, acknowledge satisfaction of the debt in the proper office, and if such release is delayed for an unreasonable time, and damage thereby ensue to the mortgagor, he may recover the same by action, but only such damages can be recovered as naturally result from the wrong complained of.
3. ———: ———: ———. The statute which provides for a penalty in case the mortgagee, etc., delay releasing the mortgage for a certain number of days, is merely cumulative and will not prevent a recovery for actual damages.

ERROR to the district court for Custer county. Tried below before HAMER, J.

Bartlett, Crane & Baldrige, and *Blair & Campbell*, for plaintiffs in error.

Kirkpatrick & Holcomb, and *Thomas Darnall*, contra.

MAXWELL, J.

This action was brought in the court below apparently to recover \$50 penalty provided for in the act of 1885. The court below, however, in striking out certain parts of the petition, held "that the plaintiffs (defendants in error) could not recover the \$50 penalty mentioned in the first cause of action because the statute was unconstitutional."

This ruling is not before this court for review and has not been discussed by the attorneys for either party, and it would be improper to express an opinion thereon.

The case proceeded to trial as a common law action to recover for actual damages sustained, and on the trial the jury returned a verdict for \$50, upon which judgment was rendered.

The first question presented is the amount of actual damages proved. John F. Miller, one of the plaintiffs below, testifies:

Q. State who had charge of the defendants' business in Broken Bow.

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A. E. P. Fountain.

Q. He is the party who gave you that note?

A. Yes, sir.

Q. State if you know at any time after this note was paid of any demand or notice being made upon Fountain concerning the cancellation of this mortgage.

A. I do.

Q. State about when the first notification was made.

A. A few days after it was paid off, probably the first day.

Q. State all about the request to cancel the mortgage, what was said and done.

A. My brother Benjamin made the demand of Mr. Fountain to release that mortgage in my presence.

Q. State as near as you can what he said to Mr. Fountain.

A. He told Mr. Fountain that we had paid the note offered here in evidence and we wished to have it released. He stated that he would do so; that he would look after it in a few days.

Q. State who else was present.

A. I cannot say whether Mr. Holland was present in the office at that time or not.

Q. State if at any time after that you received any notice that he had released it.

A. We did not.

Q. State if there was any demand made upon him after that to release it.

A. I think not in my presence.

The testimony of Fountain on this point is to the effect that the mortgage had been incorrectly indexed; that he went to the clerk's office a number of times and endeavored to find that particular mortgage, but was unable to do so, and this testimony is not denied.

It is the duty of a mortgagee or his agent or attorney, when a mortgage debt is paid to release the mortgage, ac-

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knowledge satisfaction thereof, because that is what a release is. The property of a debtor should not be clouded with apparent incumbrances when they in fact no longer have any validity, and in a proper case there is no doubt of the right of a party to recover for a failure to perform this duty. The statute is merely cumulative and provides a penalty for the failure for a certain number of days to perform the duty, but it does not prevent a recovery for actual damages. Some actual damages must be proved, however. None were proved in this case up to the time of making the demand. An attempt was made to prove damages for the use of team and loss of time in going to and returning from Broken Bow, but it is evident that such damages are not a legitimate charge against the plaintiff in error. Neither is the failure to sell certain property, as the property itself had not, so far as appears, depreciated in value.

Upon the whole case there is a failure of proof to sustain the petition, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

33	657
34	233
33	657
50	287

JANE HOLLIDAY ET AL. V. WILLIAM B. BROWN.

[FILED JANUARY 4, 1892.]

1. **SUMMONS: SERVICE: HUSBAND AND WIFE.** In an action against a husband and wife, the sheriff made return of personal service upon both. In an action on the judgment, the return being put in issue, the sheriff testified that he handed two copies of the summons to the husband—one for himself and the other for his wife, and requested him to hand the same to his wife; that he was about thirty feet from the house and saw the wife

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through the window but did not speak to her. He also testified that he afterwards saw the husband hand the wife a copy of the summons. The husband testified that he put both copies in his pocket and did not inform his wife of the summons, while the wife offered to prove that she had received no notice whatever. *Held*, That the question should have been submitted to the jury and that an instruction which withdrew the question from them was erroneous.

2. ———: ———. Service of summons upon a husband alone is not good service on the wife, even if he is served with two copies thereof, one being designed for the wife.
3. Subrogation: A SURETY is entitled to the benefit of securities for the debt in the hands of the creditor, and such creditor cannot apply such securities to the satisfaction of another debt to the exclusion of the surety.

ERROR to the district court for Seward county. Tried below before SMITH, J.

R. P. Anderson, and *D. C. McKillip*, for plaintiffs in error.

Ed. P. Smith, contra, cited, as to the service of summons: *Palmer v. Belcher*, 21 Neb., 58; *Freeman*, Judgments, secs. 119, 126; *Morse v. Engle*, 26 Neb., 247; *Lawrence v. Howell*, 52 Ia., 62. As to the relative rights of creditor and surety: *Small v. Older*, 57 Ia., 326; *Matthews v. Switzler*, 46 Mo., 301; *Harding v. Tift*, 75 N. Y., 461; *Wood v. Callaghan*, 61 Mich., 402.

MAXWELL, J.

This action is brought on a judgment of the district court of Seward county, which was recovered on the 19th day of December, 1888, by the defendant in error against the plaintiffs in error. The defendant Jane Holliday, in her amended answer, alleges:

“For her first defense to plaintiff’s petition, that no summons was served upon her either personally or by delivering a copy thereof at her usual place of residence, in the

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action set forth in the petition upon which said judgment was obtained, nor did she appear in said action, either in person or by attorney, and that the court had no jurisdiction whatever to render said judgment against this defendant.

"2. And for a further and second defense to plaintiff's petition this defendant alleges: That said pretended judgment is alleged to have been founded upon a promissory note, dated July 26, 1888, given by defendants, as this defendant is informed and believes, largely for usurious interest exacted of the co-defendant and husband John Holliday by plaintiff's assignor, Harry T. Jones, as cashier of the Jones National Bank, and which said note was signed by this answering defendant solely as security for her said husband, and was executed solely by her upon the agreement and representation of the payee of said note that said note represented all the indebtedness then existing against said defendants or either of them to said payee, and that said note was to be secured by and paid from the proceeds of a certain chattel mortgage then executed by her said husband on a large amount of personal property owned by him, to-wit: Twelve head of horses, twenty-two head of cattle and their increase, and about twenty head of hogs, of the value of more than the amount of said note; that said defendant, relying upon said representation and the faithful performance of the agreement to apply said mortgaged property to the payment of said note, then signed and delivered said note, and said mortgage was then at same time executed and delivered to plaintiffs' assignor to secure the same, and but for said representations and the agreement to execute and deliver said chattel mortgage securing the payment of said note, this defendant would not have executed the same.

"And defendant says that all of the foregoing facts were known to plaintiff and plaintiff's assignor at the time of the alleged indorsement of said note to plaintiff, as also

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at the time of the conversion of said mortgaged property as hereinafter mentioned.

"And this defendant further alleges that long after the pretended recovery of the alleged judgment against this defendant, on said note mentioned in plaintiff's petition, to-wit, in the month of February, 1889, the plaintiff took possession of said mortgaged property and converted the same to his own use and refused to apply it to pay said note or pretended judgment; and this defendant alleges that said personal property was of value more than sufficient to pay said promissory note and interest and the pretended judgment for the same, and the said personal property or the value thereof should have been by plaintiff applied to satisfy and pay any indebtedness by reason of said note or said pretended judgment. Yet the plaintiff, though often requested, has refused to so apply said mortgaged property or the value thereof.

"This defendant further alleges, on information and belief, that said plaintiff, Wm. B. Brown, is only the nominal owner of said promissory note and said pretended judgment; that the same was not purchased by him for value or received by him in good faith, but that the same was indorsed to him (if at all) by said H. T. Jones without consideration and for the purpose of cheating and defrauding this defendant out of her proper and just defense to the same. And defendant alleges that the sole interest in said note and pretended judgment has at all times belonged to said H. T. Jones, as cashier of said Jones National Bank."

To this answer the defendant in error filed a lengthy reply, which need not be noticed.

The return of the officer on the summons in the original case is as follows:

"STATE OF NEBRASKA, }
SEWARD COUNTY. } ss.

"Received the within writ the 14th day of November,

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A. D. 1888, at 4 o'clock P. M., and I hereby certify and return that I served it on the within named defendants, John Holliday and Jennie Holliday, by delivering to each of them a true and certified copy of this writ, with all the indorsements thereon, and return this writ with all the indorsements thereon and return this writ this 16th day of November, A. D. 1888.

"Sheriff's fees, \$1.65.

J. M. SMILEY, *Sheriff*.

"Returned and filed this 16th day of November, A. D. 1888."

Mr. Smiley was called as a witness in the case, and testified that he did not leave a copy of the summons with Mrs. Holliday nor at her usual place of residence, but "delivered to John Holliday a copy, and delivered him a second copy for his wife and asked him to hand it to her, and he handed it to her." He also testifies that he drove into the door-yard with a double team; that Mr. Holliday was banking the house; that he stayed ten or fifteen minutes; that he conversed with Mr. Holliday several minutes before he handed him the copies of the summons; that he did not speak to Mrs. Holliday, although he saw her through the window; that as he turned to go away he saw Mr. Holliday hand the copy to his wife. He also testifies that he was about thirty feet from the house.

On the trial Mrs. Holliday offered to prove that no summons had been served upon her and that the court had no jurisdiction of her person. This offer was overruled and the evidence excluded.

The husband testifies that the sheriff handed him two copies of the summons—one for himself, and requested him to hand the other to his wife; that he read the copy directed to himself and folded them both together and put them in his pocket and never did hand a copy to his wife or notify her that she had been sued.

It will be observed that the sheriff's own evidence con-

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tradicts his return, as he did not serve the summons personally on the defendant.

The court instructed the jury: "In this case, under the pleadings, the evidence, and the law, the judgment upon which this action is brought is binding and conclusive upon both the defendants in this action."

This was clearly erroneous. All the testimony shows that the summons was not served personally on the wife, nor left at her usual place of residence. The officer was clearly guilty of a false return.

In this state a wife is a person distinct from her husband, and to be bound by the judgment must be served with summons, and service upon her husband is not service upon her. She was entitled to her day in court, and if she was not served she is not bound by the judgment.

Sec. 69 of the Code provides: "The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day." The intention of the law is that the officer shall personally serve the summons if that can be done in the county. If the person is temporarily absent a copy left at his usual place of residence will be sufficient, but where the officer goes to the residence of the party and finds him at home the service should be personal.

Had the wife been temporarily absent from home, and the officer had left a copy thereof at her residence, no doubt it would have been sufficient to give the court jurisdiction; but the officer cannot by parol delegate a third party to serve the summons who will make no return of his doings in the premises, and more particularly where such third party had an interest in the result of the suit. In brief, the statute contemplates personal service where that can be had, but where the defendant cannot be served personally then the summons may be left at his usual place of residence. In the case at bar, the officer, although he saw

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the wife through the window, made no attempt to serve the summons upon her, and the proof fails to show that she was notified of the pendency of the action. / There is no doubt also that the wife as surety for her husband is entitled to have the securities taken to secure the note for \$1,803 applied on that note, or, in case she is compelled to pay it, turned over to her.

There are some things connected with the giving of the second note for \$1,900 that are not satisfactorily explained, but are proper subjects for a jury to consider.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

COBB, CH. J., concurs.

NORVAL, J., did not sit.

HERMAN BUBSTER V. STATE OF NEBRASKA.

[FILED JANUARY 4, 1892.]

1. **LARCENY: EVIDENCE.** In a prosecution for larceny the owner of the property ordinarily must be called as a witness to prove the non-consent to the taking of the property.
2. **Confessions: INDUCEMENTS OF OFFICER.** When from the cross-examination of an officer it appears that he held out inducements to the accused to confess, a confession thereafter made to him is not admissible in evidence.

ERROR to the district court for Douglas county. Tried below before CLARKSON, J.

John P. Davis, for plaintiff in error, cited: Wharton, Criminal Evidence, secs. 623, 625, 632, 673, 862.

33	663
44	417
33	663
52	382
33	622
56	500

George H. Hastings, Attorney General, contra, cited, as to the constituents of larceny: *Maxwell's Crim. Proc.*, 360; 1 *Bishop's Crim. Law*, 567; 2 *Id.*, 758 and note 1; *Chaplin v. Lee*, 18 Neb., 440; *Mead v. State*, 25 *Id.*, 444. As to the confessions: 1 *Roscoe, Crim. Ev.*, 40, 42; 1 *Phil. Ev.*, 397; *Commonwealth v. Galligan*, 113 *Mass.*, 202; *Smith v. State*, 17 Neb., 358; *State v. Grear*, 29 *Minn.*, 221; *State v. Laliyer*, 4 *Id.*, 277; *Priest v. State*, 10 Neb., 393; *Jones v. State*, 13 *Tex.*, 168; *McCullough v. State*, 48 *Ind.*, 109; *Ray v. State*, 50 *Ala.*, 104; *Anderson v. State*, 25 Neb., 550.

MAXWELL, J.

The plaintiff in error was informed against in the district court of Douglas county for the larceny of a buggy of the value of \$75, and on the trial found guilty, and sentenced to imprisonment in the penitentiary for one year.

The sole question in this court is the sufficiency of the evidence to sustain the verdict. The buggy, it seems, was found at a paint shop in the city of Omaha, and it is claimed the plaintiff in error took the buggy there to be painted, and that it had been taken feloniously without the owner's consent.

There are two serious objections to this verdict. First: The owner of the buggy, although apparently within reach of the process of the court, was not called as a witness. Her son-in-law, who resides with her, testifies that he did not give his consent, and very freely testifies that his mother-in-law did not. She was within reach of the process of the court, and should have been called as a witness to prove her non-consent.

The rule is very clearly stated in note 183, vol. 1 *Phillips on Ev.* (4th Am. Ed.) A conviction of larceny ought not to be permitted or sustained unless it appears that the property was taken without the consent of the

Robinson Notion Co. v. Ormsby.

owner, and the owner himself should be called, particularly in a case like that under consideration, when the acts complained of may be consistent with the utmost good faith. There is a failure of proof therefore on this point. Second—The chief of police of the city of Omaha was called as a witness, and on his direct examination testifies in substance that the plaintiff in error confessed to him and that he offered no inducements to secure such confession. On cross-examination, however, he in effect admits that he did hold out such inducements, and his testimony is clearly inadmissible, as also that of Mr. Cusick the policeman.

There is not sufficient evidence to support the verdict and the judgment is reversed and a new trial awarded.

REVERSED AND REMANDED.

THE other judges concur.

J. T. ROBINSON NOTION CO. V. ORMSBY & SWAYZER.

33	665
48	841

[FILED JANUARY 4, 1892.]

Attachment: GROUNDS. One A, who was engaged in the mercantile business, being considerably indebted for goods, traded his stock, which was worth about \$2,000, for wild land of questionable value and incumbered, whereupon a creditor to whom he was indebted for goods attached the stock. *Held*, That sufficient cause was shown for an attachment and that the district court erred in discharging it.

ERROR to the district court for Butler county. Tried below before MARSHALL, J.

J. H. Grimm, W. E. Bauer, and Steele Bros., for plaintiff in error.

Matt. Miller, and E. R. Dean, contra.

MAXWELL, J.

On the 2d day of March, 1889, plaintiff in error commenced an action in the district court of Butler county against the defendants to recover the sum of \$487.33 for goods and merchandise sold and delivered to defendants, who were then engaged in the mercantile business in Dwight, Nebraska. On the same day an attachment was issued against the property of defendants in said case on the ground that they had disposed of their property with intent to defraud their creditors. And on the 6th day of March, 1889, the sheriff attached the stock of goods and merchandise as belonging to defendants and of the value of \$——.

The defendants moved to dissolve said attachment for the reason that the statements made in the affidavit therefor were untrue. The motion was submitted to the court on affidavits and documentary evidence contained in the record. The court sustained said motion and dissolved the attachment.

The record also shows that subsequent to plaintiffs' attachment, to-wit, on the 7th and 8th days of March 1889, actions were commenced and attachments levied on this same stock of goods and merchandise by the Consolidated Coffee Company, H. T. Clarke Drug Co., E. M. Smith, and Sprick & Rigget, said attachments being issued on the same grounds as the attachment of this plaintiff. All of said attachments were prosecuted to judgment and said stock of goods and merchandise ordered sold to satisfy their claims, without objection on the part of defendants.

It further appears from the records that on February 27, 1889, just prior to this attachment, while defendants owed large sums of money, George Ormsby traded the

stock of goods to Adelbert Birdsall, a brother-in-law of defendant living with the said George Ormsby, and received in consideration therefor 160 acres of uncultivated land in Holt county, Nebraska, without any improvements thereon, said land being mortgaged for \$400 and taken subject to the mortgage.

The stock of goods was worth about \$2,000, and apparently largely purchased on credit. This stock thus purchased the debtor claims that he had the right to trade off for unproductive property of doubtful value, and that by doing so he would not be hindering and delaying, if not defrauding, his creditors. No doubt there are cases where a person heavily indebted may trade productive property or property readily convertible into money for non-productive property, and there be no ground for charging him with attempting to delay or defraud his creditors. Each case must be determined by its own circumstances, but it is very evident that the owner of a stock of goods purchased with the understanding, implied at least, that he would act in good faith with his creditors, and if need be apply his property to the payment of his debts, cannot, without the consent of his creditors, dispose of such goods for incumbered and unproductive property which is practically unsalable, and under the most favorable circumstances would greatly delay the collection of the debt. If such transactions were sustained, it would result in most cases in defrauding creditors. The whole credit system rests upon the presumed honesty and integrity of those purchasing on credit. The law requires a debtor to hold all property not exempt ready to be applied to any legal demand.

From the first this court has, as far as possible, enforced the rule that a debtor apply his property in payment of his debts. Thus, in *Rogers v. Jones*, 1 Neb., 417, it was held that it would open a wide door to fraud to permit an insolvent to convert his property into notes payable to a friend, and that a creditor's bill would lie to reach

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the friend. In that case Jones, being insolvent, sold his stock to Ford for the agreed price of \$4,100, taking his notes therefor, payable in six, twelve, eighteen and twenty-four months—the transaction concealed from the creditors. The transaction was held fraudulent as to creditors. So here the debtor, being in straitened circumstances, disposed of his goods in such a way as to greatly delay, if not wholly defeat, his creditors. On his own showing, there was sufficient cause for an attachment.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

DWELLING HOUSE INS. CO. V. SAMUEL WEIKEL.

[FILED JANUARY 4, 1892.]

Insurance: APPLICATION: WAIVER. In an action on a policy of insurance the testimony tended to show that the application was filled out by the company's agent who solicited the risk; that the insured was unable to read and not accustomed to transacting much business; that some of the answers in the application were untrue, but there was a conflict in the testimony as to their being read to the insured before the application was signed. It also appeared that after the loss the company sent an adjusting agent who estimated the loss at a specified sum, for which sum a draft was sent to the insured in full of all demands, which he refused to receive. *Held*, That the testimony supported the verdict and that the company was liable for the loss.

ERROR to the district court for Cuming county. Tried below before POWERS, J.

Uriah Bruner, for plaintiff in error, cited: *Davis v. Neligh*, 7 Neb., 84, 88; *Altschuler v. Algaza*, 16 Id., 631, 632; *Engster v. State*, 11 Id., 542; *Treadway v. Ins. Co.*, 29 Conn., 69; *State Ins. Co. v. Jordan*, 24 Neb., 358; *State Ins. Co. v. Shreck*, 27 Id., 527; *Reynolds v. Ins. Co.*, 34 Md., 280; *Greenl., Ev.*, 560; *Lee v. Ins. Co.*, 44 N. W. Rep. [Ia.], 683.

J. F. Losch, *contra*, cited: *Cannon v. Ins. Co.*, 11 N. W. Rep. [Wis.], 11; *Alexander v. Ins. Co.*, 2 Hun [N. Y.], 655; *Gans v. Ins. Co.*, 43 Wis., 109; *Goodwin v. Ins. Co.*, 73 N. Y., 492; *Continental Ins. Co. v. Lippold*, 3 Neb., 391; *Susquehanna Mut. Fire Ins. Co. v. Cusiok*, 19 Am. Law Rev., 656; 16 W. N. C. [Pa.], 133; *Stone v. Ins. Co.*, 28 N. W. Rep. [Ia.], 47; *Rowley v. Ins. Co.*, 36 N. Y., 550; *Owens v. Ins. Co.*, 56 Id., 565; *State Ins. Co. v. Shreck*, 27 Neb., 527; *Diehlman v. Ins. Co.*, 78 Mich., 141; *Phoenix Ins. Co. v. Barnd*, 16 Neb., 90.

MAXWELL, J.

The defendant in error commenced an action against the Dwelling House Insurance Company of Boston, Mass., to recover for an alleged loss under a policy issued by said insurance company to said Weikel. The policy was written for five years from December 11, 1886, and covered the following described property as being on lot 4, in block 29, in West Point, Cuming county, Neb., viz.: Frame dwelling house, insured for \$400; household furniture, for \$100; beds and bedding, for \$30; wearing apparel, for \$100; sewing machine for \$35; frame barn, No. 2, with foundation and sheds adjoining, situate 100 feet from dwelling house, for \$100; farming implements while on premises, for \$168; wagon and harness while on premises, for \$80; horses and mules not to exceed \$100 on each while on the farm of the insured.

The insurance company in its answer denies each and every allegation of said petition, except that the property covered by said policy was situate on the south twenty-two feet of lot 4, in block 29, in West Point, Cuming county, Nebraska; that the property described was destroyed by fire November 14, 1887, and that Mr. Weikel gave notice of said alleged loss in February, 1888, and alleged that said policy was given upon the written application of Mr. Weikel; that said application by the terms of the policy was made part thereof, and the representations therein contained were warranties on the part of the assured; that Mr. Weikel did not own said lot 4, or any part thereof, at the time of the issuance of said policy, and that said premises and the personal property were incumbered by various mortgages, mechanics' liens, and otherwise, and that the value of said farming implements, wagon, harness, horses, and mules altogether did not exceed \$450; that on December 3, 1885, said plaintiff mortgaged said premises to Albert Prucha to secure the payment of a note for \$125, payable in two years after its date, which mortgage at the date of said application and ever since has been a lien upon said premises; that said mortgage was foreclosed in the district court of Cuming county on March 29, 1888, and said premises were by decree of the court ordered to be sold to satisfy said mortgage debt; that on December 11 the south twenty-two feet of said lot 4 was incumbered as hereinbefore set forth, and that on said last named date the legal title to said premises was in the plaintiff's daughter Amelia, and so remains; that on January 12, 1887, said plaintiff, by mortgage deed, duly executed and recorded, conveyed the said south twenty-two feet of said lot to one Edmund Krause to secure a note for \$110 due and payable October 12, 1887, which said mortgage debt was at the time of the fire, and still is, unpaid.

That on January 24, 1887, said Edmund Krause filed a mechanic's lien against the said dwelling house for the

sum of \$127.17, and one Alfred Miller also filed a mechanic's lien against the same for \$28.75, which said mechanics' liens remain unpaid and were and are valid liens on said premises, by reason of each and all of which said matters and things said policy became, and is, absolutely null and void; that on December 12, 1884, said plaintiff mortgaged to one A. O. Mogul one of the horses included in said insurance policy and which was burned by the said fire, to secure the payment of a note of that date for \$71.31, which mortgage debt was at the time of the plaintiff's application, and still is, unpaid; that on August 23, 1887, said plaintiff mortgaged to one Rebecca W. T. Crowell the other horse that was burned by said fire and included in said insurance policy, to secure the payment of a note for \$38 which at the time of said fire was unpaid and still is unpaid; that it was provided in and by said policy "that if the property thereby insured, or any part thereof, shall be sold, conveyed, incumbered by mortgage or otherwise, or any change takes place in the title, use, occupation, or possession thereof, whatever; or if the interest of the assured in said property, or any part thereof, now is, or shall become any other or less than a perfect, legal, and equitable title and ownership, free from all liens whatever, except as stated in writing thereon, or if the buildings or either of them stand on leased ground or land of which the assured has not a perfect title, then, and in every such case, the said policy shall be absolutely void."

That it is provided in said policy that any attempt to defraud or deceive on the part of the assured, and any misrepresentation in the proofs or examination as to loss or damage, shall forfeit all claims under said policy; that the proofs of loss mentioned in the plaintiff's petition, as having been furnished this defendant on the 7th day of February, 1888, * * * concealed the condition of the title to said premises and the incumbrances thereof, and by stating the existence of one of said incumbrances only, and

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concealing the others hereinbefore set forth, sought to deceive the defendant and misled it into believing that there was only one incumbrance on said premises; and in said proof falsely stated that said property was owned by the assured, all of which was done with the intent to defraud and deceive said defendant.

Mr. Weikel in his reply admitted that he mortgaged said premises to one Albert Prucha on or about the third day of December, 1885, to secure the payment of \$125, and that said mortgage has been foreclosed as stated in defendant's answer; and admits that he mortgaged the said premises to one Edmund Krause on or about the 12th day of January, 1887, to secure the payment of \$110, * * * and admits that Alfred Miller filed a mechanic's lien against said premises for \$28.75, a part of which remained unpaid at the time of said fire, and admits that he gave certain chattel mortgages on a portion of the property afterwards destroyed by fire and insured by said defendant; and alleged that the plaintiff, being unable to read and believing that said application contained only his answers, * * * signed the same, but alleges that the answers to the questions in the copy of the said application attached to said answer were not his answers to questions 5, 6, and 9 therein.

The jury found for the plaintiff and assessed his damages at \$317.

The testimony tends to show that the defendant in error is unable to read; that the agent of the plaintiff in error called upon him and solicited the insurance upon the property in question; that such agent filled out the application upon actual view of the property.

The defendant in error testifies that the application was not read to him, but the agent, after filling the same out, requested him to sign the same, which, not being aware of its importance, he did.

The agent, however, testifies that he wrote down the an-

swers of the defendant in error as they were given, and in effect denies the defendant in error's testimony.

The testimony also tends to show that there was no intention to defraud the insurance company; that the defendant in error is comparatively an ignorant man and unaccustomed to doing business, and he seems to have placed great confidence in the agent of the plaintiff in error, with whom he seems to have been acquainted.

The testimony also tends to show that after the fire the plaintiff in error sent an adjuster to examine the loss and he estimated it at about the sum of \$240, and a draft for that amount was forwarded to the defendant in error, as payment in full. This the defendant in error refused to receive, and thereupon brought this action.

From the foregoing statement it is evident that the equities of the case are with the defendant in error and the verdict is not excessive.

An insurance company, like any other business agency, must act in good faith with those who enter into contracts with it, and it is not the business of courts to search for pretexts to relieve it from the obligations it has assumed. It has received the premium; it is but justice that it pay the loss.

The judgment is clearly right, and is

AFFIRMED.

THE other judges concur.

33 674
38 391

HENRY BAKER V. CITY OF FAIRBURY.

[FILED JANUARY 4, 1892.]

Occupation Tax: VOLUNTARY PAYMENT. One B. took out a license to sell malt, spirituous, and vinous liquors from the city of F., for which he paid the city \$500, and \$500 occupation tax. This was continued for three years, the money being paid freely and without question each year. Afterwards he sought to recover back the money paid for occupation tax upon the ground that the ordinance had not been lawfully passed. *Held*, That the money had been paid voluntarily and the court would not inquire into the validity of the ordinance.

ERROR to the district court for Jefferson county. Tried below before MORRIS, J.

John Saxon, for plaintiff in error, cited, contending that the tax was illegal and could be recovered back: *Torbitt v. Louisville*, 4 S. W. Rep. [Ky.], 345; *Hatter v. Greenlee*, 26 Am. Dec. [Ala.], 374; *Cotter v. Doty*, 5 O., 397; *CIN. v. Bryson*, 15 Id., 625; *Claflin v. McDonough*, 84 Am. Dec. [Mo.], 54, and notes; *Ligonier v. Ackerman*, 15 Id. [Ind.], 323; *Chandler v. Sanger*, 19 Id. [Mass.], 367-695; *Hilborn v. Bucknam*, 57 Id. [Me.], 816; *State v. Gray*, 23 Neb., 369; 2 Dill., Corps., sec. 751; 4 Wait, A. & D., 476; *Cobb v. Carter*, 87 Am. Dec. [Conn.], 178.

E. H. Hinshaw, *contra*, cited: 4 Wait, A. & D., 480; *Mutual Life Ins. Co. v. Wager*, 27 Barb. [N. Y.], 354; *Peterborough v. Lancaster*, 14 N. H., 382; *West v. Houston*, 4 Harr. [Del.], 170; *Bucknall v. Story*, 13 Am. Dec. [Cal.], 220; *Kraft v. Keokuk*, 14 Ia., 86; *Espy v. Fort Madison*, Id., 226; *Lester v. Baltimore*, 29 Md., 415; *Cooley*, Taxation [2d Ed.], 809; *Welton v. Merrick Co.*, 16 Neb., 83; *Foster v. Pierce Co.*, 15 Id., 48; *Bates v. York Co.*, Id., 284; *Mays v. Cincinnati*, 1 O. St., 268;

Burroughs, Tax., 266; 2 Dill., Mun. Corp. [3d Ed.], 941; *Detroit v. Mastin*, 22 Am. Dec. [Mich.], 512-21.

MAXWELL, J.

A demurrer to the petition was sustained in the court below and the action dismissed. The petition is as follows:

"Said defendant is a city of the second class, duly organized under the laws of Nebraska, being divided into two wards only, and whose council is composed of two councilmen, elected as such from each ward, and no more; and having less than 5,000 inhabitants, and was so at all of the times hereinafter mentioned.

"2d. That on or about the 1st day of May, 1887, the said plaintiff was about to engage in the business of vending malt, spirituous, and vinous liquors within said city, and thereupon made application to the mayor and council of said city for a license for such business, and gave his bond and in all respects complied with the laws of the state and the ordinances of said city in order to obtain the same, and also paid into the treasury of said city the sum of \$500 therefor as he was required to do, and was thereupon granted such license by said mayor and council.

"3d. That at the time when said license was so granted to him, and after he had so paid said \$500, but before said license was issued and delivered to him, the said mayor and council of said city then and there claimed and represented to plaintiff that there was then in force a certain other ordinance of said city, known as 'Ordinance No. 41,' which imposed and required plaintiff to pay for and take out a second and further license known and called an occupation license, the charge or fee for which was also fixed at the sum of \$500, and then and there demanded and required of plaintiff the payment of said sum of \$500 before said first mentioned license would be issued to him. And he avers that said mayor thereupon refused to issue said first mentioned license or to refund the money so paid in therefor

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unless said so-called occupation fee was also paid by him. And plaintiff says that in order to obtain said first mentioned license and to save himself from loss of said \$500 so paid in, and to avoid an arrest of his person for attempting to carry on his said business without the same, he was compelled to pay and did pay said so-called occupation license fee of \$500. Thereupon said mayor did issue said first mentioned license, but none other, and plaintiff was then permitted to carry on his said business in said city during said year ending May 1, 1888.

"4th. That afterwards, to-wit, on or about the first day of May, 1888, he again applied to said mayor and council of said city for license to sell such said liquors for and during the then ensuing municipal year, and filed his bond and paid into the treasury of said city the sum of \$500 therefor; and such license was thereupon granted to him by said mayor and council.

"And plaintiff avers that said mayor and council thereupon again claimed and represented to him that said 'Ordinance No. 41' was still in force in said city, and that the plaintiff would be compelled to take out and pay for said occupation license as in the previous year, in order to obtain said first-mentioned license. And he further says that upon the demand and compulsions and reasons as aforesaid he did then and there pay into the treasury of defendant said occupation license fee or charge of \$500, and that thereupon he received said first-mentioned license, but none other, and was again permitted to carry on his said business for and during the year ending May 1, 1889.

"5th. That afterwards, to-wit, on or about the 1st day of May, 1889, he again applied to said mayor and council of said city for a license to sell such said liquors for and during the then ensuing municipal year, and filed his bond and paid into the said city treasury the sum of \$500 therefor, and such license was thereupon granted to him by said mayor and council. And plaintiff says that thereupon

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said mayor and council thereupon again claimed and represented to him that said 'Ordinance No. 41,' of said city, was yet in full force and effect, and that he, plaintiff, would be compelled to take out and pay for said occupation license as in the two previous years, in order to obtain said first-mentioned liquor license. And he says that upon the demand and compulsions aforesaid he did then and there pay into the treasury of said city said occupation license fee or charge of \$500, and that he thereupon received from said mayor said first-mentioned license, but none other, and was again permitted to carry on his said business in said city, and so remains to this day.

"6th. That although he was so compelled and required to pay to defendant said occupation license fee or charge of \$500 for and during each of said years, yet said mayor has never executed nor delivered to him any such license, and he has never received such occupation license to this day for any of said years.

"7th. The plaintiff now states that on or about the 1st day of December, 1889, and long since said sums of money were so exacted from him by said defendant, he learned, and now charges the fact to be, that said pretenses and representations of defendant that there is or was in force in said city said pretended Ordinance No. 41, requiring the payment of such occupation license fee upon his said business, were false; that said so called Ordinance No. 41 was not at any of said times, nor during any of said years, nor any part thereof, so in force or existence in said city; that said Ordinance No. 41, although duly published by defendant, and recorded in defendant's ordinance book, was never, in fact, passed or enacted by the council of said city; that at the time when said proposed 'Ordinance No. 41' was being considered by and in said council, and not upon its passage, to-wit, April 25, 1887, said council was composed and consisted of only four members aforesaid, and that upon the 'yeas' and 'nays' being called upon the question

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of its passage, only two of said councilmen voted 'yea' for its passage, and two of them voted 'nay' against its passage, and the adoption of said ordinance was not concurred in by a majority of the members elected to said council as required by defendant's charter in order to become an ordinance of said city, so that the same never became an ordinance, as said mayor and council well knew. But plaintiff says, and further charges the fact to be, that said mayor and said two councilmen who had so voted 'yea' for the passage of 'said 'Ordinance No. 41' then and there wrongfully and unlawfully conspiring together to secure the enactment and publication thereof, to the injury and damage of plaintiff and others engaged in the same business, did then and there aid, counsel, and procure said mayor wrongfully and unlawfully to vote upon the passage of said ordinance 'yea' with them, and thereupon to declare said ordinance duly carried and enacted, and to cause the same deceitfully to be published and recorded as a valid ordinance of said city, all of which was done, and said false and deceitful pretended ordinance was thereupon signed by said mayor, and falsely and deceitfully sealed with the seal of said city, and ordered published, and was so published on the 29th day of April, 1887.

"8th. And plaintiff further states that said false and deceitful pretended 'Ordinance No. 41' has ever since been kept and maintained of record by the mayor and council of said city, and wrongfully enforced by defendant as valid and binding, and defendant's marshal and policemen instructed and required to enforce the same, and to arrest any and all persons found violating its provisions or carrying on such business without having paid to defendant the license fee therein and thereby enacted, notwithstanding such person or persons may have paid for and taken out a regular license to sell such liquors as required by the laws of the state. And this plaintiff was so as aforesaid wrongfully and deceitfully compelled by said de-

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defendant to pay into the treasury said sums of money at the time mentioned, to-wit: On or about May 1, 1887, the sum of \$500; on or about May 1, 1888, the sum of \$500; and on or about May 1, 1889, the sum of \$500; in all, the sum of \$1,500, and to his damage \$1,500, with interest on each of said payments from the date thereof.

"The plaintiff therefore prays for a judgment against said city of Fairbury for the sum of \$1,500, with interest on \$500 thereof from May 1, 1887, at seven per cent; and interest on \$500 thereof from May 1, 1888, at seven per cent; and interest on \$500 thereof from May 1, 1889, at seven per cent, and his costs."

According to the plaintiff's own statement of the case, an ordinance was passed by the city of Fairbury, which required a saloon-keeper to take out license for the sale of intoxicating drinks for which he was required to pay \$500, and also an occupation tax of \$500 for the use of the city.

The ordinance under which the latter was collected, it is claimed, was not lawfully enacted, and the plaintiff's whole case hinges upon this proposition. It is unnecessary to enter upon an examination of the question.

The plaintiff, at the time he paid the money, made no objection thereto, but paid the same freely and voluntarily.

The mayor and council had authority to fix the amount of license at such sum in excess of \$500 as they saw fit. They chose to fix it at \$1,000, including the tax, and this sum, so far as appears, the plaintiff paid without question. He is not in a situation, therefore, to recover it back. The judgment is right, and is

AFFIRMED.

THE other judges concur.

A. U. BECKER V. H. B. SIMONDS.

[FILED JANUARY 5, 1892.]

33	680
40	149
40	792
33	680
48	868
33	680
54	620
33	680
150	348
38	680
61	52
461	857

1. **Judgment on Pleadings: DENIAL: WAIVER.** On a motion overruled, under sec. 440 of the Civil Code, to render judgment in favor of the party by law entitled thereto under the pleadings, though a verdict has been rendered adversely, and the party subsequently answers, joining the issue and going to trial on the merits, *held*, that the party thereby waived the error in review in this court.
2. **Review: MOTION FOR NEW TRIAL NECESSARY.** In an action at law, to review errors on the trial, they must have been assigned as errors on a motion for a new trial. (*Manning et al. v. Cunningham*, 21 Neb., 298.)
3. —: **PRESUMPTIONS.** A verdict and judgment will not be set aside, as unsupported, when all the evidence submitted to the jury is not preserved in the bill of exceptions brought up to the supreme court, the presumption being strongly in favor of the regularity of proceedings in the court below. (*Garneau Cracker Co. v. Palmer*, 28 Neb., 307.
4. —: **ENTRY OF JUDGMENT: DISCRETION.** The action of the district court in entering judgment on a verdict *de facto* on a trial, in the face, under the eyes, and the recorded minutes of the court, *held* to be wholly within its duty and judicial discretion, independent of the *post factum* affidavits of jurors who concurred in the verdict.

ERROR to the district court for Webster county. Tried below before GASLIN, J.

J. S. Gilham, for plaintiff in error.

J. L. Kaley, *contra*.

COBB, CH. J.

On the 9th day of October, 1886, plaintiff in error, A. U. Becker, brought an action before a justice of the peace on two promissory notes, one dated March 23, 1886, for

\$20, one dated March 15, 1886, for \$130, each bearing interest at ten per cent from date, and each due October 1, 1886.

Defendant adjourned the cause by his affidavit twice. On the 14th of December, on the demand of plaintiff, defendant filed his set-off, and trial was had to the justice. The set-off was as follows:

"Comes now the said defendant, and for answer herein says that he admits the execution and delivery and his indebtedness on the two notes sued on herein.

"For further answer herein said defendant says that on the 13th day of January, 1883, Silas M. Milligan and Mrs. H. A. Milligan were indebted to said defendant in the sum of \$240. At the request of said plaintiff, and by consent of said defendant, they, the said Milligans, made, executed, and delivered to said plaintiff their two certain joint promissory notes of that date aggregating the sum of \$240, with ten per cent interest thereon from the date thereof, which, by the express agreement between said plaintiff and defendant, was to be applied as payment on the debt then due from said defendant to said plaintiff. Defendant avers that said plaintiff failed and refused, and still fails and refuses, to give said defendant credit for said \$240, or any part thereof, or to pay the same.

"Defendant says that he is not indebted to said plaintiff in any sum whatever, but that on the contrary the said plaintiff is now indebted to said defendant the difference between said \$240 with interest from said 13th day of January, 1883, and the sum of \$140 with interest thereon from March 15, 1886, at ten per cent, to-wit, the sum of \$184 with interest thereon from September, 13, 1882, for which last named sum, with interest thereon as aforesaid, defendant prays judgment against said plaintiff and costs of suit."

The plaintiff replied, admitting the making of the notes by Milligan and that they were by agreement to be credited

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as payments when paid on defendant's indebtedness then existing in behalf of plaintiff; that the proceeds of said notes were duly credited on the indebtedness, and the defendant received the benefit of the notes, which were used to extinguish an amount of indebtedness existing in favor of plaintiff equal to the amount of the notes. That on January 13, 1883, plaintiff and defendant had a full and final settlement of all the matters between them, including all the indebtedness before that time owing to plaintiff by defendant, and all the payments and credits made thereon by defendant, including the Milligan notes; that plaintiff thereupon turned over to defendant every claim or note then held by him against defendant as fully paid, and claimed to hold no further charge or demand against him by reason of anything prior to the settlement.

On December 15, 1886, the justice found that there was due the plaintiff from the defendant on the notes sued on \$149.33 as principal and interest, and that on the defendant's set-off there is nothing due, and gave judgment for the plaintiff for the amount found due and costs \$2.80, with interest on the judgment at the rate of ten per cent. From this judgment the defendant appealed. His answer in the district court only differed from that set out, by asking judgment for \$240 with interest from January 13, 1883. To this the plaintiff replied that he had credited the notes on the indebtedness of 1883, and since then had claimed nothing by reason of the transactions of that year.

On January 12, 1888, there was a trial to a jury with verdict for defendant of one dollar. The plaintiff moved the court, notwithstanding the verdict, for judgment for the amount of the notes, for the reason that on the pleadings he was entitled to judgment in law. This motion was overruled and exception taken.

The plaintiff again moved for a new trial, which was granted, with judgment for defendant's costs, taxed at \$21.75. The defendant put in an amendment to his answer.

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The amended answer specifies the debt of Simonds to Becker in 1883 as a note for \$406.50, and makes the same allegations as in the two former, then adds: "Defendant further says that having been misled by the false and fraudulent representations of plaintiff he was induced to and did through mistake pay the full amount of the said \$406.50 note to plaintiff in money, by reason whereof he overpaid the same in a sum equal to the full amount of the said Milligan notes. That after defendant had paid and obtained possession of said \$406.50 he discovered his mistake, whereupon he demanded of plaintiff repayment of the sum aforesaid overpaid, which plaintiff then and there refused and still refuses to pay, or any part thereof."

The plaintiff's motion to strike the amended answer from the files was overruled, and the plaintiff filed his amended reply: "Admitting the making of the Milligan notes to him, and that he was to give defendant credit therefor on the indebtedness then existing by defendant, but denies that they were to be credited on the \$406.50 note alone, but were to be credited on any and all notes and indebtedness then owing by defendant to plaintiff; that said notes were so credited and that the defendant received the full benefit thereof to extinguish an amount of indebtedness equal to the amount of the notes.

"That on January 13, 1883, he had a full and complete settlement of all matters with defendant, including all the indebtedness owing to him, and all the payments and credits made by defendant, including the Milligan notes; that he then turned over to defendant each and all of every claim and note then held by him against defendant as fully paid, and claimed to hold no further demands against him by reason of anything preceding said settlement."

On April 12, 1888, there was a trial to a jury with verdict for the defendant of \$196, of which sum the defendant enters a remittitur of \$37. The plaintiff's motion for a

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new trial was overruled and judgment entered for \$159 and costs of suit, and exceptions taken.

It also appears of record that the journal entry of the verdict was in accordance with the separate copy of the verdict for \$1.96 until November 24, 1888, while the judge's minutes show a verdict for \$196 and judgment for \$159. On said date the defendant moved to correct the record, and the journal entry was changed upon evidence by striking out the period between the figures one and nine by direction of the court.

The plaintiff assigns as error :

1. In overruling the plaintiff's motion for judgment on the pleadings, notwithstanding the verdict on the first trial.
2. In overruling plaintiff's motion to strike out defendant's amended answer.
3. The defendant's answer does not state a set-off.
4. The verdict is not sustained by sufficient evidence.
5. In overruling the motion for a new trial.
6. In changing the record of the judgment after the ruling on a motion for a new trial, and after the term of court, and after the filing of the supersedeas bond in this case.

In support of the first assignment, the plaintiff in error cites section 440 of the Civil Code, that "Where, upon statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court though a verdict has been found against such party." To this provision there has been established a limitation where the party, as in this case, after motion and waiving demurrer, answers over and goes to trial on the merits of the issue which he has elected to join, he waives the error on the overruling of motion or demurrer. Nor was this error assigned in the court below on the motion for a new trial, 21 Neb., 288. (*Pottinger v. Garrison*, 3 Neb., 221; *Tomer v. Denmore*, 8 Id., 384; *Harval & Uhl v. Gray*, 10 Id., 186.)

As to the second and third assignments, the amended answer of the defendant, whether stating a set-off or counter-claim, or whether for money by mistake in fact paid by defendant in the transactions involved in the plaintiff's cause of action, is not deemed to have been reversible error. The court in its proper discretion overruled the motion to strike it out, and the plaintiff elected to join issue on a trial of merits.

The first, second, and third assignments are therefore overruled.

As to the fourth assignment, that "the verdict is not sustained by sufficient evidence," it does not appear from the record that other testimony than that of the parties to the action is preserved in the bill of exceptions, but that the notes shown in evidence, as exhibits to the defendant's testimony, were not preserved as a part of the evidence. The testimony of the parties, though sharply conflicting, was such as to convince the jury, who heard *all* the evidence, of the credibility as well as sufficiency of the defendant's evidence in support of the verdict.

It has been held that "A verdict of a jury and judgment will not be set aside, as unsupported, when the bill of exceptions shows that all the evidence submitted to the jury is not brought up, all presumptions being in favor of the regularity of proceedings in the district court." (*Garneau Cracker Co. v. Palmer*, 28 Neb., 307.)

The fourth and fifth assignments are overruled.

The sixth assignment is that of error of the court in changing the record of the judgment from that entered by the clerk subsequent to the motion for new trial, and to the term of court at which the judgment was entered, and to the filing of the supersedeas bond.

This action of the court in entering judgment on the verdict *de facto* on a trial, in the face, under the eyes, and the written minutes of the court, was wholly within its judicial duty and discretion, and was not dependent on the

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post factum affidavits of jurors who rendered the verdict. The judgment of the district court is

AFFIRMED.

THE other judges concur.

THE SINGER MANUFACTURING CO. V. H. P. DUNHAM.

[FILED JANUARY 5, 1892.]

1. **Replevin: JUDGMENT MUST BE ALTERNATIVE.** In replevin, where a verdict is returned in favor of the defendant, the judgment must be for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding the property, and costs of suit. (*Hooker v. Hammill*, 7 Neb., 231.)
2. ———: ———. The provision of statute requiring such judgment to be in the alternative is mandatory. (*Id.*)

ERROR to the district court for Buffalo county. Tried below before HAMER, J.

Marston & Nevius, for plaintiff in error.

A. H. Connor, and *Stewart & Rose*, *contra*.

COBB, CH. J.

The plaintiff in error brought its action in replevin against the defendant on May 21, 1888, alleging ownership and right of possession to Singer sewing machine No. 7,288,962, style of I. F. B. W. D. C., and that defendant wrongfully detains the same, asking judgment for the title and possession and for costs.

The defendant answered denying the allegations of the plaintiff, and setting up that the machine was imperfect; that it would not perform the work represented by the

33	686
36	781
33	686
38	206
33	686
40	558
33	686
53	398
54	164
33	686
59	162

plaintiff's agent, J. N. Jenkins, as an inducement to defendant to purchase the same: that it was perfect in all respects and would perform any work intended to be done and performed by any perfect machine, and was of the value of \$85, warranting the same accordingly, upon which defendant relied, not having tried the machine, and upon which representations and warranty defendant executed the contract of purchase to the plaintiff; and avers that the machine was not perfect and would not perform the work as represented, and was not of the value of \$85, or any other sum, by reason of which there was and is no consideration for said contract.

The defendant further set up her counter-claim that after making the contract she paid the plaintiff \$25, as follows: \$15, the value of her old sewing machine, and \$10 in cash, which the plaintiff retains, to her damage \$25; that by reason of the false representations of the plaintiff she was induced to part with her old machine, and has been without the use of one by reason of the worthlessness of the one purchased, and in controversy, for more than thirteen months, to her damage \$5 monthly, amounting to \$65, and to her full damages in the premises \$90, for which she asks judgment.

The plaintiff's motion to strike from the answer the defendant's allegations as to the imperfection of the machine was overruled, and that to strike out the answer setting up a counter-claim was sustained.

There was a trial to a jury June 13, 1889, with a verdict that the right of possession of the property at the beginning of the action was in defendant, and the value of her right \$25, with damages for detention at 10 cents.

The plaintiff's motion for a new trial was overruled and judgment entered on the verdict, with exceptions of record. Errors are assigned as follows:

1. The verdict is contrary to the law and evidence.
2. It is not sustained by sufficient evidence.

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3. In admitting improper evidence for the defendant as to the quality of the machine in controversy.

4. In giving instructions 1, 2, 3, of the court's own motion.

5. In refusing instructions 2, 3, 4, asked by plaintiff.

6. In excluding proper evidence offered by plaintiff.

7. And giving instructions inconsistent with each other.

8. And in overruling the motion for a new trial.

The cause having been brought to this court on error by the plaintiff, the defendant on the 6th day of May, 1890, made and filed a motion reciting that the transcript of the proceedings filed with the petition in error shows that the judgment of the lower court, which was duly rendered on the verdict, was informally and defectively entered by the clerk of said lower court in the journal thereof, by reason of which no final judgment appears in the transcript, and praying that reasonable time might be granted by this court for the correction of said judgment entry in accordance with the facts, and that defendant be allowed to file herein a certified copy of said judgment as corrected. Whereupon an order was, on the 7th day of said month, duly entered that said motion be sustained upon the filing of an affidavit in support of said motion, etc.

It now appears that no affidavit has been filed in the case, nor has any additional transcript or paper whatever been filed or presented in the case.

I here copy the judgment as it appears in the record: "And now on this 10th day of September, 1889, it being the second day of said term, this cause came on for hearing in open court on behalf of plaintiff, this was called upon hearing the application for a new trial, it was overruled, to which ruling the plaintiffs excepts, and forty days from the rising of the court are allowed for the plaintiff to reduce its bill of exceptions to writing. Judgment is therefore rendered on the verdict for defendant." To which is added, "To which judgment the plaintiff then

and there excepted as being informal and wrong and wholly insufficient."

I also copy the verdict: "We, the jury, being duly impaneled and sworn, do find and say that we find the right of possession of the property at the beginning of the action was in the defendant and the value of her right of possession to be \$25 and assess her damages for plaintiff's illegal detention of the property at 10 cents."

This being an action of replevin in which the property had been delivered to the plaintiff, it falls within the provisions of section 190 *et seq.* of the Civil Code. Section 191 provides that "In all cases when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant"; and 191a, "The judgment in the cases mentioned in sections one hundred and ninety, one hundred and ninety-one, and in section one thousand and forty-one of said Code shall be for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property, and costs of suit."

It will readily be seen by a comparison that the verdict does not strictly comply with the provisions of the statute, as the jury did not find "whether the defendant had the right of property," nor that "she had the right of possession only"; but only the independent fact that the right of possession of the property was in the defendant. There was evidence, as shown by the bill of exceptions, as to the defendant's right of property in the chattel replevied, and that question should have been passed on by the jury in their verdict. Such is the letter of the statute applicable to such cases, and there is sufficient reason why it should be enforced.

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But the principal error is in the judgment. In the case of *Hooker v. Hammill*, 7 Neb., 231, it was held that the provision of the statute requiring the judgment in cases like the one at bar, when in favor of the defendant to be in the alternative, is mandatory. This decision does not rest upon technical grounds only. But it is the right of plaintiff that the judgment should be in such form that he could discharge it by returning the property replevied.

As there must be a new trial, it is not deemed necessary or proper to examine the other errors assigned. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

H. C. STRYKER V. J. A. CRANE & Co.

[FILED JANUARY 5, 1892.]

Review. The instructions of the court examined and approved, and the testimony to the jury found sufficient to support the verdict.

ERROR to the district court for Butler county. Tried below before POST, J.

S. H. Steele & Bro., for plaintiff in error, cited, as to the tenth instruction: *McPherson v. Wiswell*, 19 Neb., 117; *Caldwell v. Bridal*, 48 Ia., 15. As to the thirteenth instruction: *Little v. Woodworth*, 8 Neb., 284; *Smith v. Justice*, 13 Wis., 671; *Hahn v. Doolittle*, 18 Id., 208; *Fisk v. Tank*, 12 Id., 276, and notes; *Henshaw v. Robins*, 9 Met. [Mass.], 83; *Randall v. Thornton*, 43 Me., 226; *Lamme v. Gregg*, 1 Met. [Ky.], 446; *Warren v. Van Pelt*, 4 E.

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D. Smith [N. Y.], 205; *Blakeman v. Mackay*, 1 Hilton [N. Y.], 266; 1 Parsons, Conts. [5th Ed.], 579; *Jack v. R. Co.*, 53 Id., 401; *Callanan v. Brown*, 31 Id., 333; *Austin v. Nickerson*, 21 Wis., 542; *Wood v. Smith*, 4 Car. & P. [Eng.], 45. As to the fifteenth instruction: *Smith v. Green*, 1 C. P. D. [Eng.], 92; *Randall v. Newson*, 2 Q. B. Div. [Eng.], 102; *Marsh v. Webber*, 16 Minn., 418, 421; *Bradley v. Rea*, 14 Allen [Mass.], 20; *Jeffrey v. Bigelow*, 13 Wend. [N. Y.], 518, 523; *Wintz v. Morrison*, 17 Tex., 373; 2 Sutherland, Damages, 435; *Pinney v. Andrus*, 41 Vt., 631; *Faris v. Lewis*, 2 B. Mon. [Ky.], 375; *Rose v. Wallace*, 11 Ind., 112; *Sherwood v. Langdon*, 21 Ia., 518; *Hill v. Balls*, 2 H. & N. [Eng.], 299; 2 Benj., Sales, sec. 1362.

Geo. I. Wright, contra, cited, as to the eleventh instruction: Benj., Sales, secs. 610, 611; *Vincent v. Leland*, 100 Mass., 432; *Wilnot v. Hurd*, 11 Wend. [N. Y.], 584; Sackett, Instructions to Juries [2d Ed.], 573, 574. As to the thirteenth: Sackett, Instructions to Juries [2d Ed.], 570; Benj., Sales, sec. 613; *Van Buskirk v. Murden*, 22 Ill., 446; *Thorne v. McVeigh*, 75 Ill., 81; 1 Parsons, Cont., 462, 463. As to the fifteenth: 2 Am. & Eng. Ency. Law, Div. 5 of Damages, 13; Sackett's Instructions to Juries [2d Ed.], sec. 1, p. 231; sec. 7, p. 233-4; *Rolf v. Pilloud*, 16 Neb., 21; *Bond v. Dolby*, 17 Id., 491.

COBB, CH. J.

On December 1, 1887, the plaintiffs in the court below alleged that the defendant was indebted to them in \$187.50, on account of forty-four hogs sold to him on September 10, 1887, no part of which was paid, and all of which was then due with interest.

The defendant answered, admitting the purchase of the hogs and that he had not paid for them, and setting up that at the time of the sale the hogs were infected with a

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contagious or infectious disease, and had recently been exposed to such disease, which was known to the plaintiffs; that they sold the hogs to the defendant without informing him of the fact, and which defendant had no knowledge of; that the sale was therefore void, and was prohibited by law, and defendant is not liable for the purchase money.

Second—That as an inducement to defendant to buy the hogs the plaintiffs falsely represented that they were all right and were free from disease; that they were brought from the state of Kansas, from a district in which there were no diseased hogs, thereby warranting them to be all right and free of disease, which statements were known to be false by the plaintiffs at the time of the sale; for, in fact, the hogs were at the same time infected with a contagious or infectious disease to which they had been recently exposed, and had not all come from the state of Kansas, which was known to the plaintiffs; that the defendant had no knowledge of the condition of the hogs, but relied upon the plaintiffs' representations and was induced thereby to purchase the hogs, of which thirty-four shortly died of disease and the remainder were worthless from exposure to it.

Third—That said disease was communicated to defendant's sound hogs by reason of contact with the hogs purchased of plaintiffs, by which fifty-nine of such died, to the defendant's damage \$200, for which sum he asks judgment.

The plaintiffs replied in a general denial.

There was a trial to a jury, and verdict for the plaintiffs, on February 1, 1888, for the amount claimed, \$187.50, with interest from September 10, 1887.

The defendant's motion for a new trial was overruled, and judgment entered on the verdict.

Seventeen errors are assigned by the plaintiff in error, of which those only will be considered found to be argued in the brief of counsel.

The first is that of paragraph ten of the court's instruc-

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tions to the jury of its own motion: "No. 10. If the defendant has produced a preponderance of the testimony to the effect that said hogs were infected or recently exposed to an infectious disease at the time he purchased them, and that said fact was known to plaintiffs, you will find for defendant on his first defense. If he has not such preponderance on these issues, you will find for plaintiffs on that defense."

Sec. 76 of the Criminal Code cited by counsel, and given to the jury in the eighth instruction of the court, provides that "It shall be unlawful for any person to sell, barter, or dispose of * * * any horses, cattle, sheep, or domestic animals, knowing that such horse, cattle, sheep, or domestic animals are infected with *contagious or infectious* disease or have been recently exposed thereto, unless he shall first duly inform the person to whom he may sell, barter, or dispose of such horse, cattle, sheep, or other domestic animal of the same, and any person so offending shall be fined in any sum not less than \$20 nor more than \$100, or be confined in the jail of the county, not exceeding three months."

Doubtless, upon the general principles of law, no person could, by a sale thus prohibited as a misdemeanor, maintain a cause of action. But a sale, to come within the statute, must have been made with knowledge, or such notice as would impute knowledge of the fact and condition of the animals on the part of the vendor. Under this provision the defense in the court below seems to have been well pleaded, and the law was sufficiently given in charge to the jury. It was not the intention of the legislature, as I construe the statute, to apply it to two distinct diseases affecting the same animals, one contagious and the other infectious; but to a disease affecting horses, cattle, sheep, or other domestic animals, which was either infectious or contagious.

There is a distemper known to be prevalent among the

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swine of this state called hog cholera or swine plague, and I believe it is considered to be both contagious and infectious in so far as veterinary authority makes a distinction as to cause and effect. If the definition of a standard English author be accepted, that "*contagious* disease is communicated by contact or touch, and that *infection* is the subtle or virulent matter proceeding from diseased bodies and imparting the same to others," there is still the diseased body present as the cause of both, and the metaphysical distinction of the author would not be apparent to the swine herd or the pork dealer.

Undoubtedly the contagion of the distemper was the evil intended to be counteracted by the passage of the act in its application to the sale and disposal of hogs. The use of the words "contagious or infectious" in the statute is believed to have been intended to describe one disease, and not distinctive diseases. If this construction is not correct it was not good pleading, by the plaintiff in error, to have used the words in the disjunctive and alternative sense.

The purpose of instruction number ten being then to inform the jury that if the hogs were infected, or had been recently exposed to an infectious disease, that of hog cholera or swine plague, they should find for the defendant, it was not deemed necessary to use both descriptive terms. One was sufficient to instruct the jury. Nor was it error, in this view of the case, to have refused instruction number one asked by the plaintiff in error, to the same effect as that given by the court, but employing both terms descriptive of the disease.

The second error argued, that, by the instructions numbers eleven and thirteen, the court charged that the warranty by the vendor is a "contract," and "that in order to find that the seller warranted the thing sold, the agreement to warrant must enter into and form part of the contract of sale," and further, "that the defendant must have had

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reasonable grounds to suppose that the plaintiffs intended to warrant the hogs free of disease," were instructions not comprehended by the jury, and were calculated to mislead them, notwithstanding the proof of warranty in order to effect the sale, and the reliance of the plaintiff in error upon it.

We do not find the objection to these instructions urged by counsel. The misapprehension of the jury is not to be inferred from any abstruse or recondite sense of the language used. It does not appear that the rule of law applicable to the facts was not correctly stated. It is clearly upheld by precedent and authority. (*Vincent v. Leland*, 100 Mass., 432; *Wilmot v. Hurd*, 11 Wend. [N. Y.], 584; *Sackett's Inst. to Juries*, 573, 574.)

The instruction does not base the warranty upon what the vendor intended, but upon what the buyer "had reasonable grounds to suppose" the seller intended to do by his representations in evidence to the jury.

Instruction number twelve, given by the court on its own motion, is also objected to, and is as follows: "In order to find for defendant on this issue, you must first find that plaintiffs warranted the hogs sold to be all right and free from disease. Second, that defendant relied upon said warranty in making said purchase. Third, that the hogs were not all right, but on the contrary were infected with an infectious and contagious disease. And fourth, that he has been damaged thereby. If you find for the defendant on all the foregoing propositions, then defendant should recover on his second defense. If you find for plaintiffs on said questions or any of them, you would have to find for the plaintiffs on said issue."

The use of the words "on this issue," in the instruction complained of by plaintiff in error, is not considered to be injudicious or erroneous in designating the questions to the jury.

The court gave further instructions as follows: "14. If

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the vendor or seller merely states an opinion, or gives his judgment on a matter about which he has no special knowledge, and upon which the buyer also might reasonably be expected to have an opinion, and to exercise his own judgment, such transaction would not amount to a warranty."

While this instruction is abstract in sense, there was testimony to the jury, that of one of the plaintiffs below, which rendered it applicable and pertinent.

"15. In order to entitle the defendant to recover damages on his counter-claim, it must be established by a preponderance of testimony that the hogs in question were diseased with an infectious or contagious disease, or had recently been exposed to such a disease within the knowledge of plaintiffs, or some of them; that plaintiffs concealed said fact from defendant at the time of the sale. It must further be proved that defendant's sound hogs became diseased in consequence of coming in contact with the hogs purchased from plaintiffs, and that some of them died or were damaged as the result of such disease, without any fault or negligence on the part of defendant."

We think this instruction covers all that the plaintiff in error was entitled to have given under his counter-claim. To maintain the claim the major proposition of disease and warranty at sale must appear from that satisfactory evidence which the jury failed to find, and which the record fails to show.

The several instructions requested on the trial and refused by the court, in so far as the law applicable to the evidence was correctly stated, were sufficiently comprehended in the instructions given by the court, and were therefore properly refused. The judgment of the district court is

AFFIRMED.

THE other judges concur.

EMMA I. FULLER ET AL. V. THOMAS RYAN ET AL.

[FILED JANUARY 5, 1892.]

Review: BILL OF EXCEPTIONS OMITTED. When the transcript of the record in a civil case brought to this court contains only the pleadings and record of the entry of judgment, which latter conforms to the pleadings, and in which no errors appear, the judgment will be affirmed.

ERROR to the district court for Saunders county. Tried below before MARSHALL, J.

John S. Gregory, for plaintiffs in error.

Ryan Bros., contra.

NORVAL, J.

This was an equitable action brought in the court below by the plaintiffs in error. The trial court found the issues in favor of the defendants Erastus E. Brown, Thomas Ryan, and Robert Ryan, and against the plaintiffs, and also in favor of the plaintiffs and against the defendant John J. Halligan, and decreed that the defendant Halligan held the title to the southwest quarter of section 20, in township 14 north, range 5 east, in Saunders county, in trust for the use and benefit of the plaintiffs, and that the plaintiffs should pay said Halligan the sum of \$300 within ninety days from the date of the decree. Subsequently the plaintiffs filed a motion in the district court to modify the decree to the extent of the \$200 ordered to be paid, which was overruled and plaintiffs except.

The case is submitted upon the record. There is no bill of exceptions, and the transcript of the record shows no other proceedings in the case, except the pleadings and record entry of the decree, and the overruling of plaintiffs'

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motion to modify the same. The averments in the petition, so far as they refer to Brown, Ryan, and Ryan are denied by their answer. Halligan filed a demurrer to the petition, which was overruled, but he did not answer. It appears from the facts set up in the petition that Halligan purchased the land at a referee's sale under partition proceedings in trust for the plaintiffs, for the sum of \$300, which amount was paid to the clerk of the court, and the referees executed a deed to Halligan. The \$300 was not furnished by the plaintiffs, nor have they repaid the same to Halligan. He was therefore entitled to have the money refunded. So far as we are able to discover, the decree was entered in conformity with the pleadings, and that there are no irregularities or errors in the proceedings. As the period fixed by the trial court in which the plaintiffs were to pay the money has expired, the plaintiffs are required to pay to the clerk of this court, within ninety days from the filing of this opinion, for the use of Halligan, the sum of \$300 and seven per cent interest thereon from April 20, 1889, the date of the decree in the court below, and in default of such payment the plaintiff's petition is dismissed; but in case such payment is made, said Halligan is required to execute to the plaintiffs a deed for said land, within thirty days after said sum and interest is paid, to the clerk of this court, and in default thereof the decree shall stand for such conveyance.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ARNOLD BRECHER V. JULIUS TREITSCHKE.

[FILED JANUARY 5, 1892.]

Review. The verdict is warranted by the evidence, and no error appearing in the record that could materially affect the merits of the case, the judgment is affirmed.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Charles Ogden, for plaintiff in error.

Smith & Powell, contra.

NORVAL, J.

The defendant in error was plaintiff in the court below. The petition contains two counts. The first alleges, in effect, that on the 13th day of March, 1884, plaintiff gave the defendant \$1,000 for the purpose of applying the same to the compromise of three certain claims against plaintiff held by foreign creditors; that defendant was unable to effect a settlement of said claims, and on March 20, 1884, paid back to plaintiff the sum of \$615.60, but has neglected and refused to pay the balance, \$384.40, although requested so to do.

The second avers, in substance, that the defendant promised to pay the costs in a certain suit entitled *Friberg & Workum v. Treitschke*, in the sum of \$432.18, and that defendant has paid \$295.05, leaving unpaid a balance of \$137.13, which plaintiff was compelled to and did pay.

The prayer is for judgment in the sum of \$384.40 with interest from March 20, 1884, and \$137.13 with interest thereon from March 25, 1884, and costs.

For answer to the first cause of action the defendant denies each allegation therein except that he was employed

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by the plaintiff and that he paid the plaintiff the sum alleged.

In answer to the second cause of action defendant admits that he paid the plaintiff the sum of \$295.05 and denies all other averments.

The jury returned a verdict for the plaintiff for \$384.40, with interest. \$134.32.

The first ground assigned for reversal is that the testimony was insufficient to support the verdict. It is undisputed that the defendant in error failed in business in the fall of 1883, or spring of 1884; that on the 13th day of March, 1884, he gave to the plaintiff in error \$1,000, to be applied in settlement of the claims of A. Guinther, Shields & Son and Monk & Son, creditors of Mr. Treitschke. Brecher having failed to obtain a settlement of these claims, on March 20, 1884, he returned to defendant in error \$615.60, but he still retains the sum of \$384.40 of the amount which he had received. This sum, with interest thereon for five years at seven per cent, was found for the plaintiff below by the verdict of the jury, so that he was allowed nothing on his second cause of action.

It is contended by plaintiff in error that he is entitled to a credit against the amount he retained of the money of the defendant in error, for certain goods which he turned over to Treitschke, which it is admitted by both parties amounted to \$295.05. Whether he should receive such credit is the principal controversy in the case. If he should not, it is admitted that the verdict is for the right amount.

It appears that at the time Treitschke was financially involved, Frieberg & Workum, of Cincinnati, Ohio, commenced attachment proceedings against him to recover the amount of his indebtedness to the firm, which was in the neighborhood of \$2,300. Brecher came to Omaha after the attachment was levied, to see Treitschke for the purpose of effecting a settlement of the case. After some

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negotiations a settlement was made, and Frieberg & Workum received the amount of their claim in full. A judgment for costs, to the amount of \$432.18, had been rendered in the attachment case against Mr. Treitschke, which he was compelled to pay. The testimony of the plaintiff below was to the effect that Mr. Brecher promised, at the time of the settlement for Frieberg & Workum, that they would pay these costs, but that they now repudiated the agreement; that subsequently Brecher turned over to Treitschke certain goods to the amount of \$295.05, with the agreement that they should be applied on the costs, and that they were so applied.

Mr. Brecher, in his testimony, denies ever having agreed to pay the costs or that the goods should be thus applied, but that he delivered the goods over to Treitschke, who subsequently refused to pay him therefor. From the evidence we are satisfied that there were promises made by Brecher in reference to Frieberg & Workum paying the costs, and it further appears that whatever was said by Brecher upon that subject was in the capacity of agent for said firm, which fact was at the time known to Treitschke, and that Mr. Brecher did not individually assume the payment of the costs, nor was he personally liable therefor.

It is clear that Frieberg & Workum refused to pay them, of which fact Brecher was apprised. If the latter subsequently agreed with Mr. Treitschke that the goods should be applied on the costs, and in pursuance of such agreement such application was made, then Brecher would be bound by the arrangement, although he was not personally liable for the costs, and he would not be entitled afterwards to a credit for the goods against the \$384.40 he retained of Treitschke's money. Upon the point whether Mr. Brecher ever authorized the application of the value of the goods upon the costs, the testimony is conflicting and irreconcilable. That which the plaintiff below testifies was said and done, the defendant denies. The jury who

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heard the cause saw the parties in the giving of their testimony, and had superior means to ourselves of judging of their testimony, and their finding upon the conflicting testimony, not being manifestly against the weight of the evidence, will not be disturbed. The objection that the verdict is not sustained by the evidence must be overruled.

There was no prejudicial error on the part of the court in permitting the plaintiff below to prove that he had paid the claim of Frieberg & Workum, although the testimony was not upon a matter material to the case. It could not have had the effect to mislead or confuse the jury, for by the instructions of the court they were limited in their investigation to the question whether there was any agreement between the parties that the goods turned over to Mr. Treitschke should be applied on the costs in the attachment case.

It is finally suggested by counsel for plaintiff in error that the trial court erred in refusing "to allow him to show the facts in regard to the goods which were bid in by Brecher, and which he paid for at the instance of Treitschke and turned over to him." A complete answer is that the record does not disclose a single instance in which objections were sustained to questions propounded by counsel for plaintiff in error to his own witnesses, that he made an offer of what he proposed to prove by such witness. Such offer, under the repeated decisions of this court, was necessary in order to avail himself of the error rejecting the testimony. (*Lipscomb v. Lyon*, 19 Neb., 522; *Mathews v. State*, Id., 338; *Yates v. Kinney*, 25 Id., 123.)

The verdict being sustained by the evidence and no error appearing in the record that could materially affect the merits of the case, the judgment is

AFFIRMED.

THE other judges concur.

IRENE HUGHES v. C. C. HOUSEL ET AL.

[FILED JANUARY 5, 1892.]

38	708
47	81
147	190
33	703
50	402

1. **Judgments: VACATION: PLEADING.** When a party seeks to set aside a judgment rendered against him, which is regular on its face, on the ground that he has a meritorious defense to the action, he must plead the facts constituting such alleged defense.
2. **Fraud: LIMITATIONS.** An action for relief on the ground of fraud must be brought within four years after the discovery of the facts constituting the fraud, or facts sufficient, if pursued, to lead to such discovery.

ERROR to the district court for Douglas county. Tried below before GROFF, J.

Estabrook, Irvine & Clapp, for plaintiff in error.

Jno. L. Webster, contra, cited, as to the point discussed in the opinion: *Hemmer v. Wolfer*, 124 Ill., 435; *Turner v. Jenkins*, 79 Id., 228; *Haworth v. Huling*, 87 Id., 23; *Miller v. Handy*, 40 Id., 448; *Harman v. Moore*, 112 Id., 221; *Rubush v. State*, Id., 107; *Harnish v. Bramer*, 71 Cal., 155; *Nevill v. Pope*, 95 N. Car., 346.

NORVAL, J.

Irene Hughes brought this suit in the court below against Charles C. Housel and William Hughes alleging in her petition:

"That she is the only surviving heir of Rebecca C. A. Hughes, deceased, who departed this life intestate on or about the 27th day of November, 1867, seized in fee simple of the following described real property, to-wit: Lot three (3), block one hundred and sixty-five (165), in the city of Omaha, Douglas county, Nebraska. And plaintiff avers that as such heir she is the owner in rever-

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sion of said property after the estate by curtesy of William Hughes is determined.

"But plaintiff further says, that on the 27th day of September, 1873, said defendant William Hughes, who is the father of plaintiff, brought suit against said plaintiff in this court asking that this plaintiff be declared a trustee for said William Hughes, for that the consideration of the property described herein was paid by said William Hughes, the deeds therefor being taken in the name of Rebecca Hughes, his wife.

"Plaintiff alleges that no service of process was had upon her in said suit, further than the return upon the summons issued in said case indicates, which return states that said summons was left at the usual place of residence of said defendant. But plaintiff avers that she was at the time of said service an infant under fourteen years of age, and had no usual place of residence within the meaning of the statutes, and that said service was void, and that all subsequent proceedings were without jurisdiction and void.

"Plaintiff further says that a decree was rendered in said case whereby Rebecca Hughes was decreed to be the trustee of said property for said defendant William Hughes, in pursuance of which said decree the master of said court executed a deed of said property to said William Hughes.

"Plaintiff further says that defendant Charles C. Housel claims to be the present owner of said property, and is in possession thereof, refusing to recognize the estate and interest of said plaintiff therein; but plaintiff avers that whatever interest said Housel has in said property is derived by mesne conveyance from said William Hughes, and that said Housel has an estate and interest therein during the life of said William Hughes at most.

"Plaintiff further says that she is, at the time of the bringing of this suit, twenty years of age and no older.

"Wherefore plaintiff prays that said decree, so as afore-

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said rendered, may be adjudged void as against said plaintiff, and of no effect, and that the deed so as aforesaid executed by the commissioner of this court to the said defendant William Hughes may be canceled and annulled; that the plaintiff's interest and estate in said property, as heir of said Rebecca Hughes, deceased, may be established and confirmed, and for such other and further relief as in equity may seem just and conscionable."

The defendant William Hughes, for answer to plaintiff's petition, and for cause of action against the defendant Charles C. Housel, says:

"1. Admits that plaintiff is the only surviving heir of Rebecca C. A. Hughes, and that said Rebecca C. A. Hughes died intestate on or about the 27th day of November, 1867, seized in fee simple of the land described in said petition.

"2. This defendant further admits that on the 27th day of September, 1873, he brought suit against the plaintiff as in said petition alleged; that said plaintiff was then an infant, under fourteen years of age, and that service of summons was made upon her as in said petition alleged. Defendant further admits the rendition of a decree in said cause, and the making and delivery thereunder, by a master commissioner of this court, of a deed for said lands as in said petition alleged.

"3. Further answering, this defendant avers that on the 31st day of August, 1878, he was adjudged a bankrupt by the district court of the United States for the district of Nebraska, and that on the 25th day of September, 1878, the defendant Charles C. Housel was appointed by said court assignee of this defendant in bankruptcy. That said assignee on the 27th day of May, 1880, executed and delivered to one Benjamin F. Troxell a deed purporting to convey said premises to said Troxell, under and by virtue of a pretended sale of said premises as such assignee, and that thereafter, to-wit, on the 15th day of

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April, 1882, said Troxell executed and delivered to said Housel a deed purporting to convey said premises to said Housel.

"4. This defendant avers that said sale to Troxell was made by said Housel fraudulently and for his own benefit; that said Housel furnished the money to said Troxell wherewith to purchase said premises; that said premises were sold to said Troxell at a grossly inadequate price, to-wit, for the price of fifty dollars, whereas said premises were at the time of said sale worth three thousand dollars or thereabouts, over and above all incumbrances; that said premises were purchased for the benefit of said Housel, and that said deed from Troxell to Housel was without consideration other than that which was the execution of a fraudulent agreement between the parties thereto, that said Troxell should purchase said premises for the use of said Housel and subsequently convey the same to him.

"Wherefore this defendant prays that the defendant Housel be decreed to hold said premises in trust for this defendant, for such estate as the court shall determine this defendant had therein at the time of said bankruptcy proceedings; that the defendant Housel be required within a reasonable time to execute and deliver to this defendant a deed for such estate in said premises, and if he fail so to do, that such deed be made by a master commissioner of this court, and for such other and further relief as equity and good conscience may require."

The defendant Housel interposed a general demurrer to the petition of the plaintiff and the cross-petition of William Hughes, which was sustained by the court and the petition and cross-petition were dismissed. Irene Hughes and William Hughes each prosecute a petition in error to this court.

The plaintiff Irene Hughes seeks to have declared void the decree rendered in an action brought against her by her father, William Hughes, for the reason that there was

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no such service of the summons upon her in that action as to confer jurisdiction. From the petition in this suit it appears that when the original action was commenced Irene Hughes, the defendant therein, was an infant under the age of fourteen years, and that the only service of summons upon her was by leaving the same at her usual place of residence.

Section 76 of the Code of Civil Procedure, relating to the service of summons upon infants, provides that "When the defendant is a minor under the age of fourteen years, the service must be upon him and upon his guardian or father; or, if neither of these can be found, then upon his mother or the person having the care and control of the infant, or with whom he lives. If neither of these can be found, or if the minor be more than fourteen years of age, service on him alone shall be sufficient. The manner of service may be the same as in the case of adults."

The statute provides that the manner of service upon an adult "shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence any time before the return day." (Code, section 69.)

In order to constitute a complete and perfect service upon a minor less than fourteen years of age, a copy of the summons must be delivered to him personally, or left at his usual place of residence, and in addition, service must be made upon his guardian or father, "if neither of these can be found, then upon his mother, or the person having his care and control, or with whom he resides, if to be found."

The object of the statute was to give notice to some one, other than the infant sued, who would likely see to it that the minor's rights are protected. The provisions of the statute are mandatory and cannot be disregarded. A minor cannot waive them, nor any one for him. They must be

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strictly observed or jurisdiction will not be acquired over the person of an infant defendant. When the record of a cause, in which a judgment is rendered against a minor, discloses that the mode pointed out by the statute for obtaining jurisdiction has not been followed, the judgment is void on its face.

Counsel for the defendant in error contends that in the absence of an averment in the petition to the contrary, it will be presumed that Irene Hughes was living with her father William Hughes when the original suit was instituted, and as he was the plaintiff therein, service could not have been properly made on him, and that the service upon Irene Hughes alone was sufficient. In other words, that the provisions of the statute providing for service of a summons upon the father of an infant does not apply when the father is the plaintiff in the action. Authorities are cited which go to that extent, while decisions are to be found which dispute the proposition. We will not now stop to consider the question, as its solution is not essential to the proper disposition of the case.

No facts are brought into this record to show that the judgment in the original action of William Hughes v. Irene Hughes is invalid upon its face. It is nowhere alleged in the petition in this case that the record in the original suit discloses that Irene Hughes was a minor, unless her minority was therein revealed, no want of jurisdiction in the court to render the judgment appears on the face of the proceedings, and it will not be presumed that the record shows a lack of jurisdiction.

This is an equitable action to set aside a judgment, regular on its face, rendered by a court of competent jurisdiction. The plaintiff herein does not allege any fact showing that she has a meritorious defense to the original action brought against her, or that the judgment therein rendered is inequitable. For aught that appears the entire consideration for the property was paid by William Hughes,

and Rebecca C. A. Hughes, plaintiff's mother, held the title in trust for him. True the petition filed by Irene avers that Rebecca died seized in fee simple of the property in controversy, but we do not think this sufficient to negative the existence of a trust. The rule is that when a party seeks to set aside a judgment rendered against him, which is regular on its face, on the ground that he has a valid defense to the suit, he must plead the facts constituting the alleged defense. The demurrer to the petition was properly sustained. (*C. B. & Q. R. Co. v. Manning*, 23 Neb., 552 *Proctor v. Pettit*; 25 Id., 96; *Osborn v. Gehr*, 29 Id., 661; *Hartford Fire Ins. Co. v. Meyer*, 30 Id., 135.)

The cause of action set up in the cross-petition of William Hughes is barred. An action for relief on the ground of fraud must be brought within four years after the discovery of the facts constituting the fraud, or facts sufficient, if pursued, to lead to such discovery. The judgment is

AFFIRMED.

THE other judges concur.

CONNECTICUT RIVER SAVINGS BANK ET AL., APPELLEES,
v. W. L. BARRETT ET AL., APPELLEES, AND CHAS.
PHILPOT, APPELLANT.

[FILED JANUARY 5, 1892.]

School Lands: FRAUDULENT ASSIGNMENT OF CERTIFICATE OF PURCHASE. One W. L. B., an insolvent debtor, was the owner of a school land certificate of purchase issued by the state, covering forty acres of land, on which the amount of unpaid purchase money was \$384. The certificate was assigned to P., who at the time had knowledge of the insolvency of W. L. B. No consideration was paid by P. to W. L. B. for the land, nor did

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he promise to pay him anything therefor. Subsequently P. paid the amount due the state and took the deed in his own name. The land was worth \$1,200. *Held*, That P. was only entitled to a lien on the land for the amount paid the state, with interest on said sum; and, subject to such lien, the land was liable to the payment of certain judgments recovered against W. L. B.

APPEAL from the district court for Cass county. Heard below before CHAPMAN, J.

H. D. Travis, and *B. A. Gibson*, for appellant, cited: *Lipp v. Land Syndicate*, 24 Neb., 698; *Newman v. Edwards*, 22 Id., 259; *Brown v. Pierce*, 7 Wall. [U. S.], 205; *Freeman*, Judgments, sec. 357; *Swartz v. Stees*, 2 Kan., 236; *Wilson v. Burney*, 8 Neb., 39; *Nessler v. Neher*, 18 Id., 651.

Byron Clark, and *E. H. Wooley*, for the judgment creditors, cited: *Traphagen v. Irwin*, 18 Neb., 198; *Story*, Eq. Jur., sec. 349.

NORVAL, J.

This suit was brought in the court below by the Connecticut River Savings Bank to foreclose a mortgage given to it by W. L. Barrett, Elizabeth Barrett, and P. A. Barrett, on the southeast quarter of section 25, township 11 north, range 11 east, in Cass county. Charles Philpot, being a subsequent mortgagee, was made a party defendant. The other defendants are judgment creditors of the mortgagors, who claim that their judgments are liens upon the land.

The appellant, Charles Philpot, filed his answer and cross-bill in the court below, setting up his mortgage for \$1,300 and interest, and praying a decree of foreclosure.

The judgment creditors filed answers in the nature of creditors' bills, setting up their judgment liens, and alleging in substance that the note and mortgage mentioned in the cross-petition of Philpot were given for a

fictitious debt, for the sole purpose of aiding the Barretts to cheat and defraud their creditors, and particularly the defendants herein, and for the same fraudulent purpose the said Charles Philpot pretends to be the owner of the northwest quarter of the northeast quarter of section 36, town 11 north, of range 11 east of the sixth principal meridian, when in truth and in fact it belongs to said W. L. Barrett, who purchased the same from the state, the title therefor being taken in Philpot's name; that Philpot claims to have paid the consideration to the state, in about the sum of \$400; that if Philpot paid the said sum, it is the only *bona fide* debt owing by said Barrett to him; that Philpot holds the legal title to said land for the benefit of said Barrett, and that said Barrett is insolvent.

The prayer is that the mortgage given to Philpot be declared fraudulent and void; that the title to the northwest quarter of the northeast quarter of said section 36 be decreed to be in said Barrett, and that the same be sold and applied in payment of the several judgments of the defendants according to their priority.

No answer was filed to the cross-petitions.

The district court found that there was due the plaintiff, on its note and mortgage, the sum of \$2,732, and that the defendant Philpot guaranteed the payment of the same and is liable for any deficiency that may be due thereon after the sale of the mortgaged premises, and that plaintiff's mortgage is a second lien upon the lands therein described, being subject to a mortgage to one Henry Du Bois.

The court further found that Charles Philpot has a third lien upon the same land for the amount of his mortgage; that W. L. Barrett is the owner of the northwest quarter of the northeast quarter of said section 36; that the conveyance of said forty acres to Philpot was to indemnify him for the sum of \$384 advanced by him for Barrett, and was taken to defeat the valid claims of the creditors of said Barrett; and that Philpot has a first lien upon said

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premises for the sum of \$384 and interest; that the judgment creditors are entitled to liens upon said land in the order in which their judgments were filed, subject to the lien of said Philpot. The real estate was ordered sold and that the proceeds thereof be applied in satisfaction of the sums found due, in the order of their priority. The defendant Philpot appeals from that part of the decree which affects the forty-acre tract in section 36, claiming that it is not supported by the evidence.

It appears in evidence that the defendant W. L. Barrett, at the time of the making of the mortgage to the Connecticut River Savings Bank, held a school land certificate of purchase issued by the state for the northwest quarter of the northeast quarter of section 36, town 11, range 11, in Cass county, and as additional security for the indebtedness covered by plaintiff's mortgage Barrett assigned said school land certificate to B. A. Gibson, as agent for the plaintiff, who held the certificate as such security until about the 25th day of December, 1889, when, in consideration of the appellant Philpot guaranteeing the payment of the note of Barrett to the Connecticut River Savings Bank, being the note described in the plaintiff's petition, Gibson assigned the certificate of purchase to Philpot, who guaranteed in writing the payment of plaintiff's note, and at the same time signed with Barrett a note to Gibson for \$430 to cover the past due unpaid interest upon such note. Just prior to the transfer of the certificate to Philpot, he went to Barrett, according to his own testimony, and inquired what he was going to do with the land—the amount due the state had to be shortly paid or the contract would be canceled—to which Barrett replied he could not do anything as he did not have the money to pay it off, but if Philpot could make any arrangement with Gibson to pay out on the land he might do so. Nothing was paid by Philpot to Barrett for the land, nor did he agree to pay him anything therefor. The land was worth \$1,200, and the

amount due the state was \$384, which Philpot paid and took the deed in his own name. Barrett's equity in the land was worth over \$800, and at the time of the assignment of the certificate to appellant, Barrett was insolvent. Philpot knew of these judgments against Barrett and of the failure to collect them. For some time all of Barrett's personal property had been, and was then, mortgaged to appellant, who permitted the mortgagor to handle and sell the property without objection. Some of the mortgages, doubtless, were given to secure *bona fide* debts, but as to the others, the evidence as to good faith is very unsatisfactory. The state of the proof justified the trial court in finding that Philpot was not the absolute owner of the school land, but that he held the title in trust for Barrett, subject to his lien thereon for the amount paid the state to obtain the title. The appellant having paid the balance of the purchase money to the state, he was entitled to a lien for that amount with interest, which the decree gives him.

Appellant contends that he is entitled to a lien upon the land to secure him against liability incurred in guaranteeing the note held by plaintiff and the \$430 note given for past due interest. No claim of that kind was presented by the pleadings. Appellant did not answer the cross-petitions. He should have done so, setting up his liens, if any he had. Besides, there is no testimony tending to show that there was any arrangement or agreement between Barrett and Philpot that the latter should hold the land as security, but on the contrary that Barrett gave him his equity. Appellant cannot claim the land as security beyond the sum paid to the state to obtain the deed.

The judgment is

AFFIRMED.

THE other judges concur.

33	714
39	251
33	714
45	140
45	797

HENRY THOMPSON V. RICHARDSON DRUG CO.

[FILED JANUARY 5, 1892.]

Fraudulent Conveyances: A CHATTEL MORTGAGE executed by a debtor upon all his personal property, of a value greatly in excess of the debt secured, is fraudulent and void as to the unsecured creditors of the mortgagor.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

Maule & Sloan, for plaintiff in error.

Montgomery & Montgomery, and *Churchill, Jeffrey & Rich*, contra.

NORVAL, J.

This is an action in replevin brought by the defendant in error to recover possession of 197 pairs of spectacles and goggles, 190 purses, 24 pen-holders, 4 boxes of pens, 22 boxes of pencil leads, 13 albums, 4 toilet sets, 135 blank books, 15 library bound books, 1 glass show case, and 23 slates. The Richardson Drug Company claims the property under a chattel mortgage executed by one Josiah W. Grant. At the commencement of the suit Henry Thompson held the goods as constable, by virtue of the levy of an execution issued out of a justice court on a judgment in favor of David Wise & Co. against said Josiah W. Grant. There was a verdict in the court below for the plaintiff.

In June, 1888, one J. W. Grant was engaged in the drug business at Fairmont. So far as is known his property consisted of his stock of goods and store fixtures, which were of the value of about \$3,000. At the time, Grant was largely indebted to his creditors. On June 20, 1888, he

went to Omaha and while there executed a chattel mortgage upon all of his stock in trade and fixtures, including the property in controversy, to the Richardson Drug Company, to secure the payment of \$941.46, the mortgagor retaining possession of the property mortgaged and carrying on the business the same as he had previously done. On the 23d of June he gave mortgages upon said property to Redhead, Norton, Lathrop & Co. for \$231.20; Simeon Sawyer and John H. Welch, \$400; and Winfield S. Dresser, \$270. On the 27th day of the same month the exclusive possession of the entire mortgaged property was given to the Richardson Drug Company, under a written agreement entered into between the mortgagor and the various mortgagees, by the terms of which the Richardson Drug Company was to sell the goods at retail for a period not less than sixty days, unless a customer should be found to purchase the same in bulk, and out of the net proceeds the mortgage of the Richardson Drug Company was to be first paid, and the remainder, if any, was to be applied in satisfaction of the other mortgages in the order of their priority. Subsequently a portion of the goods, being those involved in this suit, were taken under the execution above mentioned.

In *Morse v. Steinrod*, 29 Neb., 108, it was held that a chattel mortgage executed by a debtor upon his entire personal property, of a value greatly in excess of the debt secured, is fraudulent and void as to the other creditors of the mortgagor. The same rule was held and applied in *Brown v. Work*, 30 Neb., 800.

These decisions are decisive of the case at bar. Here blanket mortgages were taken upon all the debtor's chattels, and so far as appears he owned no other property. The goods were three times the value of the debt due the Richardson Drug Company, and one-third greater than the aggregate amount of all the mortgages. The transaction was in violation of the rights of the unsecured creditors of the mortgagor, and must be held fraudulent as to them.

Fuller v. County of Colfax.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

M. E. FULLER V. COUNTY OF COLFAX.

[FILED JANUARY 5, 1892.]

1. **Tax Sale: LAND NOT TAXABLE: LIABILITY OF COUNTY.**
Where lands are sold for taxes, by a county treasurer, which are not subject to the taxation, the county is liable to the purchaser for the amount paid by him with interest. (*Roberts v. Adams Co.*, 18 Neb., 471; *Wilson v. Butler Co.*, 26 Id., 676.)
2. ———: ———: **PRESENTATION OF CLAIM.** In such a case the claim should be presented to the county board, and if rejected an appeal may be taken to the district court.
3. ———: ———: **LIMITATIONS.** The tax purchaser, who has neither demanded a deed within five years from the date of the sale, nor commenced proceedings to foreclose the tax certificate within the period of limitation for such actions, is not entitled to have the county refund the purchase money by reason of the invalidity of the tax sale.
4. **Amendment.** The second paragraph of the syllabus in *Alexander v. Wilcox*, 30 Neb., 793, corrected to read: A tax deed issued more than five years after the date of the tax certificate is invalid.

ERROR to the district court for Colfax county. Tried below before POST, J.

H. C. Russell, E. T. Hodsdon, and R. M. Bashford, for plaintiff in error.

Grimison & Thomas, contra.

33	716
43	497
33	716
48	307
33	716
50	544
33	716
58	327

Cases cited by counsel are, in the main, referred to in opinion.

NORVAL, J.

On December 11, 1888, the plaintiff presented to the county board of Colfax county a verified account of moneys claimed to have been paid by him to the county treasurer for the purchase of lands at tax sale, which were not liable for taxation. The account was disallowed by the county board, whereupon an appeal was taken to the district court, where the plaintiff filed a petition setting up sixty-one causes of action. The counts are alike, except in description of land, date, and amount.

The plaintiff for his first cause of action alleges:

"That on the first Monday of February, 1875, the county commissioners of said defendant did furnish to the assessor of Wilson precinct what purported to be a list of the lands in said precinct subject to taxation; that said list erroneously contained the following described lands, to-wit: South $\frac{1}{2}$ section 1, town 19, range 2 east, of the 6th principal meridian, in Colfax county, Nebraska; that said assessor did value said lands at \$520, and returned said valuation with other lands on the second Monday in April, 1875, to the county clerk of said defendant; that said county clerk extended the taxes of 1875 against the said lands as follows, to-wit, total, \$67.20; that on the first day of May, 1876, said taxes not having been paid, the same became delinquent, and said lands were offered for sale by the treasurer of said defendant on the first Monday of September, 1877, but the said lands were not sold on that day for the want of bidders, and that on the 1st day of December, 1877, said plaintiff bought said lands of said treasurer at private sale for said delinquent tax of 1876, and paid said treasurer the sum of \$69.79 therefor, that being the amount of taxes and interest claimed to be due

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against said lands by the treasurer of said defendant; that there was no tax due against said lands at the time of said sale and purchase, for the reason that said lands at the time they were so assessed were lands belonging to the general government of the United States and were not liable to taxation; that said lands were wrongfully placed upon said tax list by said defendant's commissioners and wrongfully assessed by the assessor of said precinct, and were wrongfully sold by said defendant's treasurer, and it was by the wrongful act of said defendant's commissioners and said defendant's assessors and said defendant's treasurer that said lands were sold upon which no tax was due at the time; that on the 6th day of November, 1879, the Union Pacific Railroad Company commenced proceedings in the circuit court of the United States for the district of Nebraska to restrain the defendant's then treasurer, John Miller, from issuing and delivering a tax deed for the above described tract of land to the plaintiff, and did, on or about said last named date, obtain a restraining order therefor from said court; that said restraining order was issued by said circuit court upon a bill theretofore filed on behalf of said Union Pacific Railroad Company against said John Miller, the treasurer of Colfax county, which bill, among other things, alleged, in substance, that the lands above described were not properly and legally subject to assessment and taxation at the time said taxes were assessed and levied thereon, for the reason that said lands then belonged to the government of the United States, and that the taxes attempted to be levied thereon by the local authorities of said Colfax county were wholly illegal and void; and that for the same reason all the proceedings relating to the assessment and levy and collection of said taxes, including the sale of said lands by the county treasurer, as above set forth, were illegal and void, and that the purchaser of said lands at said sale acquired no title to or lien upon said lands by virtue of said sale by the county

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treasurer; and that it was further alleged in said bill that notwithstanding said proceedings for the assessment and collection of said taxes and the sale of said lands were wholly illegal and void, the holder of the tax certificates issued by the county treasurer upon the sale of said lands for unpaid taxes has done all that was required of him by law to do to entitle him to tax deeds upon said lands, and that said John Miller, as treasurer of said county of Colfax, was about to issue such tax deeds to the holder of said certificates; that the answer to said bill filed in said suit in behalf of said John Miller, treasurer of Colfax county, and on behalf of said county, alleged in substance that said lands were subject to taxation and were properly assessable at the time said taxes were so levied and assessed thereon, and that all the proceedings relating to the assessment and collection of said taxes and the sale of said lands for unpaid taxes, and the issue of certificates upon said sale by said county treasurer, were regular, legal, and valid, and that the holder of said tax certificates had acquired by virtue of said tax sale a perfect title to said lands, and that he had done all that was by law required of him to do to entitle him to tax deeds upon said lands by virtue of said certificates of sale, and that said John Miller, as such treasurer of Colfax county, was about to issue tax deeds upon said lands to the holder of said certificates; that upon the issues thus formed a hearing was had in said circuit court for the district of Nebraska, which resulted in a decree in favor of the said complainant, the Union Pacific Railroad Company, and against the defendant, John Miller, as treasurer of said county of Colfax; that on the 25th day of November, 1881, the said restraining order having been continued in force from the issue thereof, on the 6th day of November, 1879, the said circuit court of the United States, by the final decree then entered in said suit, forever enjoined and restrained the said John Miller, as such treasurer of Colfax county, and his deputies and successors in office,

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from issuing and delivering any tax deed or tax deeds to the holder of said certificates, or from enforcing in any way the payment of said taxes as against said lands or from conferring any lien upon or title to said lands upon the holder of said certificates; that from said decree to the treasurer of Colfax county the successor of said John Miller immediately took an appeal of said suit to the supreme court of the United States; that on the 18th day of October, 1886, a final decree in said suit upon said appeal was by stipulation of said parties rendered in said supreme court of the United States, dismissing said appeal at the cost of the said Union Pacific Railroad Company, the appellee therein; that the dismissal of said appeal operated to continue in force the aforesaid decree of the circuit court for the district of Nebraska, forever restraining the treasurer of Colfax county from issuing to the plaintiff a tax deed or deeds upon the lands above described upon the certificates purchased and held by him as aforesaid, although the plaintiff, as the holder of said certificates, had done all that was by law required of him to do, to entitle him to said tax deed or deeds; that by reason of the premises set forth as above the defendant became liable to this plaintiff for the amount so paid by him as aforesaid, to-wit, the sum of \$69.79, with interest at the rate of twenty (20) per cent per annum from the 1st day of December, 1877.

“That said defendant, the county of Colfax, received the moneys so paid by the plaintiff as set forth in the aforesaid causes of action upon the purchase of said lands at said tax sale for unpaid taxes, and has ever since, and still does, retain the same; that said defendant, the county of Colfax, defended said suit against John Miller, treasurer of Colfax county, brought in the circuit court for the United States by the Union Pacific Railroad Company to enjoin the collection of said taxes and the issue of tax deeds upon said certificates as above set forth, and for that purpose employed counsel and paid from the county treasury all the

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costs and expenses of said defense; that upon the expiration of the term of office of said John Miller, as county treasurer of Colfax county, said defendant, the county of Colfax, instructed his successor in office to continue the defense of said suit, and for that purpose to retain the services of counsel already employed; that the said successor of John Miller, as county treasurer, acting under the direction of said defendant, did continue and maintain the defense of said suit and the expenses thereof were paid by said defendant from the county treasury; that said defendant, the county of Colfax, was the real defendant in said suit; that it ratified and approved all the proceedings taken and had therein in the name of John Miller, as treasurer, and his successor in office, including the allegations contained in said answer, and the proofs that were adduced to support the same, and also the stipulation dismissing said appeal; that pending said action and during all the time from the commencement thereof on the 6th day of November, A. D. 1879, to the 18th day of October, A. D. 1886, the said defendant, the county of Colfax, through its commissioners and officers, affirmed and maintained that under the decisions of the supreme court of the state of Nebraska, the said lands so sold for taxes were subject to taxation, that said taxes as levied and assessed were legal and valid, that the sale of said lands for unpaid taxes and the issue of the tax certificates upon said sales and the certificates themselves were legal and valid in all respects, and that the plaintiff as the holder of said certificates was entitled to a deed to said lands from the said county of Colfax or its treasurer, and that the plaintiff as the holder of said certificates had done all that was required of him to do to entitle to him said tax deeds, and that the plaintiff's title to said land under said certificates had not failed, and that he was not entitled to have, receive, or demand from said defendant, the county of Colfax, the repayment of the moneys with interest thereon which he had paid

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into the treasury of said county upon the purchase of said lands for unpaid taxes at the sale thereof by the county treasurer; and that said defendant, the county of Colfax, by reason of the premises is now estopped from asserting or setting up by way of defense to this action that the plaintiff's title to said lands had failed prior to the entry of the final decree in the supreme court of the United States dismissing said appeal on the 18th day of October, A. D. 1886, in the suit of the Union Pacific Railroad Company against John Miller, treasurer of Colfax county, as above set forth, or from asserting or setting up by way of defense to this action that the plaintiff's right of action against said county for the repayment of said moneys, as set forth in this petition, accrued prior to said 18th day of October, A. D. 1886, or from alleging or setting up by way of defense that the plaintiff, as the holder of said tax certificates, has not done all that was by law required of him to do to entitle him to tax deeds upon said certificates from the county of Colfax, or from setting up as a defense to this action that the plaintiff's title to said lands has not now failed."

To the petition the county interposed a demurrer, alleging the following grounds:

1. The court has no jurisdiction of the subject of the action.
2. The petition does not state sufficient facts to constitute a cause of action.
3. The several causes of action are barred by the statute of limitations.

The demurrer was sustained and the suit dismissed.

The action was brought under the provisions of section 131 of the revenue law, which provides that "When by mistake or wrongful act of the treasurer or other officer land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold

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the purchaser harmless by paying him the amount of principal and interest and costs to which he would have been entitled had the land been rightfully sold," etc.

This section has been under consideration by this court in several cases, and by an unbroken line of decisions it is held that where lands are sold for taxes by a county treasurer, which are not subject to taxation, the county is liable to the tax purchaser for the amount paid by him, with interest thereon. (*Roberts v. Adams County*, 18 Neb., 471; 20 Id., 409; *Wilson v. Butler County*, 26 Id., 676.)

The correctness of these adjudications is not questioned, but it is contended by the attorney for the county that the petition does not aver that the county board ever made a levy of taxes against the lands, and that the sales are void for want of jurisdiction of the treasurer to make them, and hence the county is not liable. The objection that there is no averment of the levy of a tax, is not borne out by the record. The petition does allege, in effect, that the lands were assessed by the precinct assessor, although at the time they belonged to the United States and were not liable to taxation; that they were wrongfully placed upon the tax list of the county by the county commissioners and the county clerk extended the tax against the lands. This was sufficient.

The first ground of demurrer, that the district court had no jurisdiction, must be overruled. The plaintiff presented his account to the county board for audit and allowance. It being rejected, an appeal was taken and perfected, which conferred jurisdiction upon the court. The plaintiff's causes of action were claims against the county within the meaning of the provisions of section 37, chapter 18, Compiled Statutes. The method of procedure adopted by the plaintiff in presenting his account to the county board and, when disallowed, taking an appeal to the district court, is in line with our decisions in *Richardson County v. Hull*, 24 Neb., 536; 28 Id., 810.

Section 179 of chapter 77, Compiled Statutes, entitled "Revenue," prescribes the period within which an action to foreclose a certificate of tax sale must be brought, but neither the provisions of the section, nor the adjudications of this court thereunder, cited by counsel for plaintiff in error, which affirmed the doctrine that the statute of limitations does not commence to run against the right to foreclose a tax lien until the title acquired by the tax deed has failed, have any application to the question under consideration. No tax deed was ever issued to the plaintiff, hence, he never had any title to fail. Moreover, this is not an action to foreclose a tax lien, but one to enforce a claim against the county for taxes wrongfully levied and collected by it.

Section 126 of the same chapter confers authority upon the county treasurer to issue a tax deed, when the land has not been redeemed, at any time within three years after the expiration of two years from the date of the sale, on the return of the certificate of purchase, in case the purchaser has complied with the provisions of the three preceding sections of that law.

Section 180 declares that "If the owner of any such certificate shall fail or neglect either to demand a deed thereon or to commence an action for the foreclosure of the same, as provided in the preceding sections, within five years from the date thereof, the same shall cease to be valid or of any force whatever, either against the person holding or owning the title adverse thereto, and all other persons, and as against the state, county, and all other municipal subdivisions thereof."

It is plain that there is no authority to issue a treasurer's deed after the lapse of five years from the date of the sale, or three years from the expiration of the period fixed by law for the redemption from a tax sale, and when one is issued after time it is of no validity, and creates no lien. In the second paragraph of the syllabus and in the body

of the opinion, *Alexander v. Wilcox*, 30 Neb., 793, it was inadvertently stated that "A tax deed issued more than *five* years after the expiration for the time to redeem, is invalid." If the word "five" in the sentence read "three" the proposition would be correctly written, and in harmony with the letter and spirit of the statute which makes a tax deed invalid if issued more than five years after the date of the tax sale.

In the case in hand the lands were purchased by the plaintiff, and the money paid by him on two different dates, November 7 and December 1, 1877, and the certificates were issued by the treasurer on the day of the purchase, yet no deed was demanded or issued, and no action was ever brought to foreclose the certificates, but more than eleven years after their date the plaintiff for the first time asserts a claim against the county, by presenting to the county board his account for moneys paid for the tax certificate. There is no room to doubt that the plaintiff has failed to comply with the provisions of section 180, and the county is not under any legal obligation to reimburse him for the moneys so paid out. Unless the owner of the certificate either demands a deed thereon or institutes an action to foreclose the certificate within the period prescribed by the statute, the county is not bound to save him harmless. This is clearly the meaning of section 180. The judgment in the injunction suit brought in the United States court by the owner of the lands against the county treasurer, perpetually enjoining the issuing of deeds on the certificates cannot avail this plaintiff. Not being a party to that litigation, he was not bound by the decree therein. Had he intervened and set up his certificates, and asked a foreclosure thereof within the period fixed by the statute, it would be different. That suit did not prevent Fuller from taking the statutory steps necessary to preserve his rights and fix the liability of the county. This he failed to do. In *Helphrey v. Redick*, 21 Neb., 80, MAXWELL, Ch. J.,

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says: "A judgment only binds parties and privies. A tax purchaser of real estate not a party to an action to enjoin the treasurer from issuing a deed, nor appearing in the action, is not bound by the decree."

Merriam v. Otoe County, 15 Neb., 408, is relied on by the plaintiff in error to sustain the position for which he contends. While that was a similar action to this, in one material respect the facts are unlike. In the case cited the owner of the tax certificates was a party to the suits brought by land-owners, to restrain the issuing of a tax deed and to cancel and set aside the tax certificates, and his rights were adjudicated and determined. In this case, Fuller at no time, so far as the record informs us, asserted or claimed any rights against the land-owner. Again, the provisions of section 180, copied in this opinion, were not considered in *Merriam v. Otoe Co.*, nor did the court decide whether it was essential that the tax purchaser should either demand a deed or bring proceedings to foreclose his certificate in order to maintain an action against the county for indemnity, for the mistake or wrongful act of the treasurer or other officer, etc.

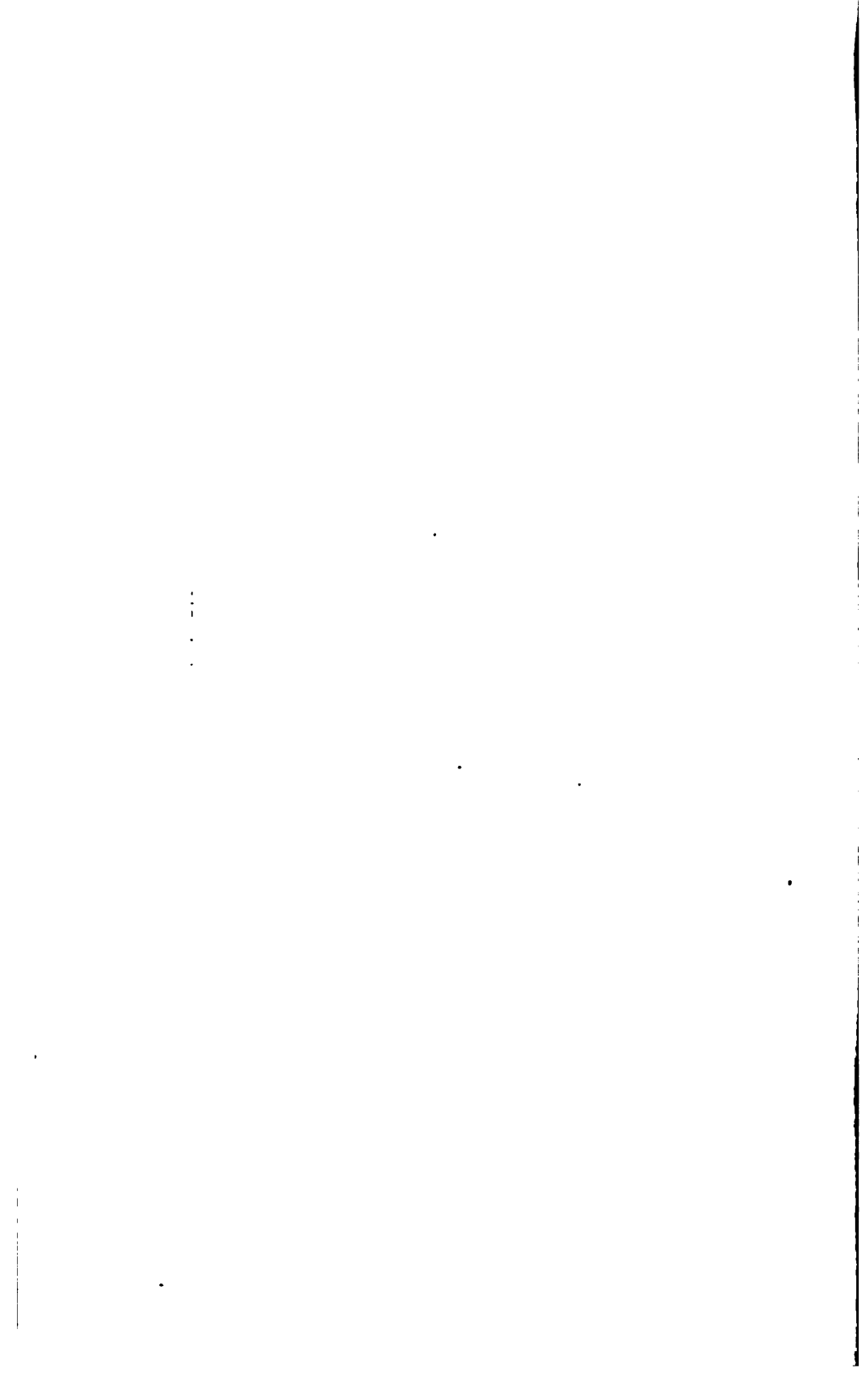
The case of *St. Louis R. Ry. Co. v. Alexander*, 4 S. W. Rep. [Ark.], 753, cited by plaintiff in error, was an action by a purchaser at a tax sale whose deed had been declared invalid, to foreclose the lien for taxes. It was ruled that the cause of action commenced to run from the date of the decree pronouncing the title bad, and not from the date of sale, nor from the expiration of the period of redemption. The question here presented was not involved in nor passed upon in that case.

Hutchinson v. Board of Supervisors of Sheboygan Co., 26 Wis., 402, was an action by the grantee of a tax deed against the county to have the purchase money refunded by reason of the invalidity of the tax sale. It was based upon a statute of Wisconsin which provided that "if, after the conveyance of any lands sold for taxes, it shall be discov-

ered that the sale was invalid, the county board of supervisors shall cause the money paid therefor on the sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, to be refunded with interest on the whole amount at the rate of seven per cent per annum, upon the redelivery of the deed to be canceled." The court held that the statute of limitations did not commence to run on the claim until the grantee has clear and positive information or knowledge of the existence of proof that the sale was invalid. This decision is not in point, being based upon a statute so materially different from the sections of the revenue law of this state. None of the other cases cited in brief of counsel for plaintiff in error conflict with the conclusion we have arrived at. The demurrer to the petition was right, is sustained, and the judgment is

AFFIRMED.

THE other judges concur.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1892.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.
HON. T. L. NORVAL, } JUDGES.
HON. A. M. POST, }

J. W. KELLY v. C. H. WATTS.

33	729
48	858

[FILED JANUARY 12, 1892.]

Review. In an action to recover for work and labor, the defense was partnership. It appeared that a partnership had existed between the plaintiff and defendant which had been published as being dissolved. This was claimed by the defendant to be a blind to keep off creditors of the plaintiff and by the latter to be a *bona fide* dissolution and thereafter he worked for his former partner by the month. *Held*, That the testimony did not preponderate against the verdict to such an extent as to show it was clearly wrong.

ERROR to the district court for Furnas county. Tried below before COCHRAN, J.

C. B. Roberts, and McClure & Anderson, for plaintiff in error.

A. Y. Wright, and J. P. Lindsay, contra.

MAXWELL, CH. J.

This action was brought by the defendant in error against the plaintiff in error to recover for work and labor performed for him. The answer is as follows:

"For further answer and defense to plaintiff's petition he alleges the facts to be, that on or about the 16th day of June, 1887, the plaintiff and defendant herein entered into and formed a partnership under the firm name and style of 'J. W. Kelly & Co.,' for the purpose of opening and running a meat market, or butcher shop, and the buying, selling, handling, and shipping of hides, poultry, etc., in Beaver City, Furnas county, Nebraska; that it was understood and agreed between said plaintiff and this defendant that each partner was to contribute one-half of the capital, bear one-half of the expenses and losses, and to devote his time and efforts to the prosecution of the business; that the labor of plaintiff and his team performed as set out in his petition, and the ice, beef, board and all materials furnished by plaintiff as set out in his petition, were performed and furnished in and about the prosecution of said partnership business and constituted a part of the capital and means which the plaintiff was to furnish and contribute in the carrying on and prosecution of said partnership business; that said partnership business was carried on until on or about the 6th day of February, 1888, and that no settlement of the partnership accounts of said firm has ever been had, nor has a settlement of said partnership business ever been made, between the parties to this action, who constituted the sole and only members of said firm."

The reply is a general denial.

On the trial of the cause the jury returned a verdict for the defendant in error for the sum of \$228.35, upon which judgment was rendered.

Hill v. Helman.

The testimony tends to show that in the spring of 1887 the plaintiff and defendant entered into partnership in the meat business at Beaver City; that this partnership continued for seven days when an advertisement was published in a local paper by the plaintiff and defendant announcing the dissolution of the partnership. It is claimed on behalf of the plaintiff in error that this advertisement was a mere blind to keep off certain creditors of the defendant in error. On the part of the latter it is contended that the dissolution of the partnership was *bona fide*; that he was thereupon employed by the plaintiff in error at \$50 per month.

There is considerable testimony, principally admissions of the defendant in error, tending to show the existence of a partnership, but upon examining the whole of the testimony we are not convinced that the verdict is wrong. The case was one proper to submit to a jury, and in the condition of the proof, this court will not disturb the verdict. The judgment is therefore

AFFIRMED.

THE other judges concur.

ISAAC A. HILL V. JOHN V. HELMAN.

[FILED JANUARY 12, 1892.]

33	731
60	736

1. **Review.** Evidence examined, and it not appearing that the verdict is clearly wrong, it is sustained.
2. **A new trial** will not be granted upon newly discovered cumulative evidence, unless the new evidence is of so controlling a character as probably would change the verdict.

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

St. Clair & McPhee, and *Arthur H. Burnett*, for plaintiff in error.

L. W. Hague, and *Leese & Stewart*, contra.

MAXWELL, CH. J.

This is an action for the conversion of certain goods which had been levied upon and sold by the plaintiff in error as sheriff. The defendant below filed an answer as follows:

"Admits that I. W. Haws executed and delivered to plaintiff his promissory note for the sum of \$519.95; admits that said I. W. Haws executed and delivered to plaintiff a chattel mortgage upon the goods, wares, merchandise, and fixtures alleged in the petition herein; admits that said mortgage was filed in the office of the county clerk of Kearney county as alleged in the petition. As to whether the sum secured by the said mortgage was paid when it became due or at any time, and as to whether plaintiff ever demanded payment thereof the defendant has neither knowledge or information sufficient to form a belief, he therefore denies the same; admits that plaintiff took possession of said mortgaged property on or about July 27th, 1889; admits that defendant is, and was on the 27th day of July, 1889, sheriff of Kearney county, Nebraska; admits that by virtue of order of attachment against one I. W. Haws upon valid, due, and unpaid claims and accounts the defendant levied upon said property and took the same into his possession as such sheriff; admits that as such sheriff, under an execution issued against the property of the said I. W. Haws upon judgment duly rendered upon the aforesaid claims of creditors, the defendant, on or about September 5, 1889, levied said execution upon said aforesaid property; admits that as such sheriff the defendant, on or about October 3, 1889,

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sold said property at public vendue to the highest bidder for cash.

"2. Defendant denies that said promissory note referred to in paragraph 1 of said petition was based upon money had and received by said I. W. Haws from this plaintiff; denies that there was any consideration whatever for said promissory note; denies that on the 27th day of July, 1889, or at any other time, the plaintiff was, or is, entitled to the possession of the mortgaged property described in the petition, or to any part or portion thereof; denies that at any time the defendant had any knowledge of any right of the plaintiff to the said mortgaged property or any part or portion thereof; denies that plaintiff, or any person for him, at any time demanded of him the said goods and chattels or any part thereof, and denies that defendant refused on any demand of the plaintiff to deliver to him the said goods.

"3. The defendant for the fourth answer and defense to the petition of the plaintiff herein says, that at the date of the execution of the note and mortgage by I. W. Haws to the plaintiff referred to in said petition the said I. W. Haws was and is the brother-in-law of the plaintiff, and was financially in failing circumstances, and was being pressed by his creditors for payment of their respective claims, all of which was well known to the plaintiff herein; that suit had been commenced and was then pending in favor of the parties in whose behalf and at whose procurement the writs of attachment referred to in the petition were issued; that pending said actions, and before such orders of attachment were issued, the said I. W. Haws and the plaintiff herein conspiring to cheat and defraud said creditors of the said Haws, and for the purpose of hindering and defeating them in the collection of their said claims, executed on the part of Haws, and was received by the plaintiff herein, the said note and mortgage referred to in said petition, and defendant alleges that the same were

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entirely without consideration; that no real indebtedness existed to plaintiff from said Haws, and that the same were so executed and delivered for the sole purpose aforesaid, and conferred no right in or to said mortgaged property upon the plaintiff herein; that the taking possession of said mortgaged property by the plaintiff was without right, and was in pursuance of the fraudulent intent aforesaid, and to cover up the said property of said Haws, and prevent the application thereof to the payment of his just debts. Defendant denies each and every allegation in said petition not hereinbefore admitted or otherwise denied."

The reply is a general denial. On the trial of the cause the jury returned a verdict for the sum of \$532 in favor of the plaintiff below, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The testimony tends to show that the defendant in error is a brother-in-law of one I. W. Haws; that Haws was carrying on the mercantile business in a small way at Heartwell; that the defendant in error had loaned Haws sums of money from time to time, and on the 26th of July, 1889, loaned him \$150, and took a mortgage on his stock of goods to secure that and other loans. The defendant in error had taken possession of the stock under his mortgage before the attachments were levied. The principal defense is that Haws was not indebted to the defendant in error. In our view the testimony sustains the verdict. The defendant in error seems to have taken unusual pains to announce to his friends that Haws was embarrassed financially, and two witnesses testify, in effect, that he stated to each of them some time prior to July 26, 1889, that Haws had nearly paid him up, and that he was through with him. This testimony was proper to submit to the jury, but is not sufficient, when considered in connection with the other testimony in the case, to show that the verdict is wrong. The first objection, that the verdict is against the weight of evidence, therefore, must be overruled.

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Second—One Thompson makes an affidavit that prior to July 26, 1889, the defendant in error said to him, "that I. W. Haws was in bad shape financially, but was square with him, the said Helman, and did not owe him, Helman, more than \$1.50, and he proposed to keep even with him." This is substantially what two other witnesses had testified to, and is not sufficient to authorize the granting of a new trial. Cumulative evidence may be sufficient to authorize the granting of a new trial when it is of so controlling a character as to render clear what was before doubtful, and would probably change the verdict. (*Levitsky v. Johnson*, 35 Cal., 41; *Windham v. Kendall*, 7 R. I., 77; Maxw., Pl. and Pr. [5th Ed.], 447.) The newly discovered evidence in this case fails to reach the degree of certainty required and will not authorize the granting of a new trial. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

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[FILED JANUARY 12, 1892.]

1. **New Trial: ORDER OVERRULING MOTION FOR, REVERSED.** In an action for the conversion of corn a verdict was returned in favor of the plaintiff. The defendant thereupon filed a motion for a new trial, which soon afterwards was overruled. In consequence of a decision of the supreme court on a similar question the district court, during the same term, reviewed its former ruling on the motion for a new trial and reversed the same, and granted a new trial. *Held*, That this was within the powers of the court, and under the circumstances was not an abuse of discretion.
2. ———: ———: **REVIEW.** On the second trial no evidence was offered by either party, whereupon the court dismissed the ac-

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tion. *Held*, That it was the duty of the plaintiff to offer evidence in support of his case, and that the supreme court would not review the action of the district court in granting a new trial in advance of the second trial.

ERROR to the district court for York county. Tried below before NORVAL, J.

Sedgwick & Power, for plaintiff in error.

E. A. Gilbert, contra, cited: *Artman v. West Point Mfg. Co.*, 16 Neb., 572; *Conrad v. Runnels*, 23 O. St., 601; *Smith v. Bd. of Education*, 27 O. St., 44; *Sang v. Beers*, 20 Neb., 365; *M. P. R. Co. v. Hays*, 15 Id., 224; *Taylor v. Spaulding*, 32 N. W. Rep. [Minn.], 863; *Gillilan v. Kendall*, 26 Neb., 82; *Sandwich Mfg. Co. v. Shiley*, 15 Id., 109; *Wise v. Frey*, 9 Id., 217; *Brown v. Edgerton*, 14 Id., 453.

MAXWELL, CH. J.

The cause of action was set forth in the petition as follows:

"That on the 29th day of May, 1888, one John Hyland was indebted to one Charles Daniels upon two promissory notes of that date executed by the said Charles Daniels and one Sylvester Evans, one of said notes becoming due the 15th day of August, 1888, and the other the 15th day of November, 1888, and also on that day the said Hyland was the owner of twenty acres of corn in the field on Mrs. Corlan's farm of eighty acres on the north half of the northwest quarter of section 19, township 9, range 1, in York county, Nebraska, being his two-thirds interest in thirty acres of corn in said field. And to secure the payment of said notes on that day the said Hyland, together with the said Evans, executed and delivered to the said Daniels his chattel mortgage, whereby he mortgaged and conveyed the said corn, together with

other property, to the said Daniels, which said mortgage was duly filed in the office of the county clerk of York county, Nebraska, on the — day of May, 1888, and all of said property so mortgaged and conveyed was not, and is not, of sufficient value to pay the aforesaid promissory notes and interest thereon, and the said Hyland and Evans were, at the time of the commencement of this action, and still are, wholly insolvent and nothing can be collected from them, or either of them. And afterwards, and before the maturity of the said notes, the said Daniels sold and assigned the said notes and the said mortgage to this plaintiff, and this plaintiff is now the owner and holder thereof, and there is due to this plaintiff the sum of \$262.75 and interest; and on or about the — day of November, 1888, the defendant took nine hundred bushels of said corn and converted the same to his own use, to the damage of plaintiff in the sum of \$198. Wherefore plaintiff asks judgment against the defendant for the sum of \$198 and interest from the — day of November, 1888, and costs of suit."

The answer is a general denial.

On the trial of the cause the court instructed the jury as follows:

"If you believe from the evidence that the plaintiff Alfred L. Snow gave John Hyland permission to sell the corn in controversy in this case, then you will return a verdict for the defendant.

"Second—Permission to sell mortgaged personal property, given by the mortgagee to the mortgagor, may be given orally and need not be made in writing.

"Third—Unless you find from the evidence that the plaintiff Snow gave permission to said Hyland to sell the corn in controversy, then you will return a verdict for the plaintiff for the value of so much of the corn sold by Hyland to the defendant as the evidence shows was covered by the mortgage introduced in evidence, with seven per

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cent interest thereon from December 7, 1888, to April 8, 1889.

The jury returned a verdict in favor of the plaintiff for the sum of \$76.51. On the next day a motion for a new trial was filed by the defendant. There was also a supplemental motion, but no date showing when it was filed. The court overruled the motion and rendered judgment on the verdict. Afterwards, during the same term, apparently in consequence of the decision of this court in *Gillilan v. Kendall*, 26 Neb., 82, the district court reversed its ruling on the motion for a new trial and set the verdict aside. On the second trial the plaintiff refused to offer any testimony and the case was dismissed, and this is the error complained of.

It was the duty of the plaintiff, on the second trial, to offer testimony in support of his case. An order granting a new trial is not such a final order as the court will review in advance of the final trial in the case, and no evidence being offered when the case was called for trial the second time, the court did right in dismissing it. There is no error in the record, and the judgment is

AFFIRMED.

POST, J, concurs.

NORVAL, J., took no part in the decision.

WILLIAM GASLIN, JR., APPELLEE, V. ISABELLA RITZEL ET AL., APPELLANTS.

JOHN L. McCAGUE, APPELLEE, V. SAME.

[FILED JANUARY 12, 1892.]

Decrees: PROCEEDINGS TO OPEN: INSUFFICIENT SERVICE. In a proceeding to open a decree rendered upon constructive service, *held*, that as against the positive affidavits of two of the defendants that they had no notice of the pendency of the action the proof to show such notice was insufficient, and said defendants were entitled to make their defense.

APPEAL from the district court for Douglas county.
Heard below before CLARKSON, J.

George W. Covell and James B. Meikle, for appellants, cited: *Brown v. Conger*, 10 Neb., 238; *Savage v. Aiken*, 14 Id., 315.

Howard B. Smith, *contra*, cited: *Brown v. Conger*, 10 Neb., 238; *Savage v. Aiken*, 14 Id., 315; *Merriam v. Gordon*, 20 Id., 405; *Cheney v. Harding*, 21 Id., 68; *Merriam v. Calhoun*, 15 Id., 569.

MAXWELL, CH. J.

A decree was rendered against the defendants on service by publication at the September, 1890, term of the district court of Douglas county. Afterwards, at the January, 1891, term of said court the defendants Isabella Ritzel and Fredericka Bailey sought to open the decree, and be permitted to defend. On the hearing the district court overruled their application and dismissed the same, from which order the defendants appeal. The affidavit of Mrs. Ritzel is as follows:

"Isabella Ritzel, being first duly sworn, upon her oath says: That she is one of the defendants in the aforesaid cause,

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and that she is one of the heirs at law of Augustus Graeter, Sr., deceased, and that during the pendency of the aforesaid action against her and the other defendants herein, she had no actual notice thereof in time to appear in court and make her defense to this action; that she is one of the daughters of the said Augustus Graeter, Sr., and that she had no knowledge whatever of the pendency of said action or of the rendition of a judgment or decree therein until long after the rendition of such judgment and decree in this cause; that she is the owner of a one-sixth interest in the undivided half of the real estate described in the petition in this action, known and described as lots 3, 8, 9, and 12 in Griffin & Smith's addition to the city of Omaha, situate upon and being a part of the south sixty-three acres of the west half of the northwest quarter of section 28, in township 15 north, of range 13 east, of the sixth principal meridian, in Douglas county, Nebraska, as a daughter and one of the heirs at law of Augustus Graeter, Sr., deceased; that no other service was made or attempted to be made upon this affiant in this cause than by publication in a newspaper, and that five years have not elapsed since the rendition of the judgment and decree in this cause; that this affiant desires to have the judgment and decree rendered in this cause opened, and that she be let in to defend upon giving notice, as required by the statutes of the state of Nebraska, to the plaintiff in this cause, and upon complying with the orders of the court which may be made in this behalf as to the payment of costs, and upon filing a full answer to the petition in this cause."

The affidavit of Mrs. Bailey is as follows:

"Fredericka Bailey, being first duly sworn, upon her oath says: That she is one of the defendants in the aforesaid cause, and that she is one of the heirs at law of Augustus Graeter, Sr., deceased, and that during the pendency of the aforesaid action against her and the other defendants herein she had no actual notice thereof in time to appear in court

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and make her defense to this action ; that she is one of the daughters of the said Augustus Graeter, Sr., and that she had no knowledge whatever of the pendency of said action or of the rendition of a judgment or decree therein until long after the rendition of such judgment and decree in this cause ; that she is the owner of a one-sixth interest in the undivided half of the real estate described in the petition in this action, known and described as lots 3, 8, 9, and 12, in Griffin & Smith's addition to the city of Omaha, situate upon and being a part of the south sixty-three acres of the west half of the northwest quarter of section 28, in township 15 north, of range 13 east, of the sixth principal meridian in Douglas county, Nebraska, as a daughter and one of the heirs at law of Augustus Graeter, Sr., deceased ; that no other service was made or attempted to be made upon this affiant in this cause than by publication in a newspaper, and that five years have not elapsed since the rendition of the judgment and decree in this cause ; that this affiant desires to have the judgment and decree rendered in this cause opened, and that she be let in to defend, upon giving notice, as required by the statutes of the state of Nebraska, to the plaintiff in this cause, and upon complying with the orders of the court which may be made in this behalf as to the payment of costs, and upon filing a full answer to the petition in this cause."

A notice of the application was duly given and answers duly filed.

One John I. Marshall made affidavit on behalf of the plaintiff as follows: " John I. Marshall, being first duly sworn, deposes and says: I was in Bradford, Pennsylvania, on September 3, 1890, and called at the home of Mrs. Fredericka J. B. Bailey, formerly Miss Graeter, and now wife of Sanford C. Bailey. I had a conversation with her relative to the former interests of her father, Augustus Graeter, Sr., and her brother, Augustus Graeter, Jr., in Douglas county, Nebraska. In reply to some inquiries by

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me she stated that her brother, Augustus Graeter, Jr., had written to her sister, Mrs. Isabella Ritzel, concerning this property, and that later on some conveyances or transfers of that property had been made to him and the papers forwarded to him in Montana. She said she did not recollect the exact contents of the papers, but said they were conveyances or deeds, and that she left the matter to her brothers, Augustus, Jr., and Adolphus, to attend to. She said that she was not positive as to the time the deeds were made and forwarded to her brother, Augustus, but that she thought it was not long after a suit had been commenced against them concerning this property, and was probably in December, 1886; at least it was in cold weather; she could not positively say that it was in December; she further stated that she had not given the matter very much attention, as she had done about as her brothers suggested in the matter.

"As to the present condition of the matter, she said that she would be governed by whatever her sister, Mrs. Ritzel, would say or do, and whatever Mrs. Ritzel and Mr. Hyde, an attorney at Warren, Ohio, would do in the matter would be all right with her, her brother Adolphus being now dead. She further stated that she joined in the conveyance mentioned above at instance of her brothers, Augustus, Jr. and Adolphus, and her sister, Mrs. Ritzel.

"I state positively and unqualifiedly that Mrs. Bailey fixed the time of the conveyance sent to her brother, Augustus Graeter, Jr., in Montana by referring to said suits and that the exact words are as follows, to-wit: 'I think it was not long after suits had been commenced against us concerning the property that we sent the deeds; it was probably in December, 1886, at least it was in cold weather.' Mrs. Bailey further said she and Mrs. Ritzel were to have half, and their attorney the other half of whatever was obtained for their interest in the said property.

"I further say, that I am not a party, nor am I in any way or manner interested in said actions, nor am I in any way or manner interested in the property in dispute in said actions, nor in any real estate in Douglas county, Nebraska, nor am I an inhabitant of said county."

There is also the letter of Howard B. Smith and W. L. McCague to Alfred E. Graeter, and an affidavit of Mr. Smith; also letters of Mr. Graeter. We fail to find any authority, however, for Mr. Graeter to act for his sisters, the defendants, nor is there any sworn evidence that he informed them of the pendency of this action.

In answer to Marshall's affidavit Mrs. Bailey makes oath as follows: "Fredericka J. B. Bailey, being first duly sworn, upon oath says that she has carefully read a copy of an affidavit made by one Jno. I. Marshall, and sworn to on the 26th day of September, 1890, by him before Clinton W. Powell, a notary public in and for Douglas county, Nebraska, filed in the above entitled causes in the district court of Douglas county, Nebraska, on the 27th day of September, 1890, said copy being hereto attached and marked 'Exhibit A,' and she positively swears and avers that she did not state to John I. Marshall on the 3d day of September, 1890, 'that she thought certain deeds were made and forwarded to her brother, Augustus Graeter, Jr., not long after a suit had been commenced against them concerning this property, which was probably in December, 1886'; that she did not state to John I. Marshall what he swears were her exact words, as follows: 'I think it was not long after suits had been commenced against us concerning the property that we sent the deeds; it was probably in December, 1886, at least it was in cold weather.' Affiant further positively swears and avers that she did not have, nor did her sister, Mrs. Ritzel, have, any knowledge of the pendency of the said actions hereinbefore named until after the decrees had been rendered in the same."

Sec. 82 of the Code provides that "A party against

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whom a judgment or order has been rendered, without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which by it or in consequence of it shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title of any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order as provided by this section, shall be allowed to present counter-affidavits to show that during the pendency of the action the applicant had notice thereof in time to appear in court and make his defense."

These defendants swear in effect that they knew nothing of these proceedings until after the decree was rendered, and hence had no opportunity to make a defense. The proof produced on the part of the plaintiff fails to show such notice except by inference. Mr. Marshall evidently called upon Mrs. Bailey for the purpose of obtaining admissions from her in regard to her knowledge of the pendency of the action.

Such evidence must be scrutinized very closely and is liable to the imperfections of memory and the coloring which a willing witness may, unconsciously perhaps, give it. This court, however, will not, upon mere inference or unsatisfactory testimony, deprive a party of his right of defense. This is a right which pertains to every one and

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no person should be deprived of it unless through lapse of time or his own neglect it is lost. The proof on the part of the appellee is not sufficient to overcome the sworn testimony of the defendants that they had no notice. The district court, therefore, erred in overruling the application. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN BLACK, APPELLANT, V. WILLIAM LEONARD ET AL., APPELLEES.

[FILED JANUARY 12, 1892.]

1. **Tax Liens: LIMITATIONS:** AN ACTION TO FORECLOSE a tax lien is barred at the expiration of five years from the time the cause of action accrued.
2. —: **ADVERSE POSSESSION.** Where a defendant in an action to foreclose a tax deed has been in the actual, open, exclusive, adverse possession of the land as owner for ten years, he thereby acquires an absolute title to the land, free from the tax deed on the property, issued more than ten years prior to the commencement of the action.

APPEAL from the district court for Saunders county.
Heard below before MARSHALL, J.

S. P. & E. G. Vanatta, for appellant, cited: *Lammes v. Comstock*, 20 Neb., 345; *Merriam v. Dovey*, 25 Id., 622; *Parks v. Watson*, 20 Fed. Rep. [Neb.], 764; *Otoe Co. v. Mathews*, 18 Neb., 466; *Merriam v. Hemple*, 17 Id., 345; *Schoenheit v. Nelson*, 16 Id., 235; *Stettinische v. Lamb*, 18 Id., 119.

33	745
34	827
35	745
143	497
33	745
56	653

T. B. Wilson (*M. B. Reese*, of counsel), *contra*, cited: *Blackwell*, Tax Title, 174; *Shepherd v. Burr*, 27 Neb., 432; *Parker v. Matheson*, 21 Id., 546; *D'Gotte v. Sheldon*, 27 Id., 829.

NORVAL, J.

This action is to foreclose a tax lien. The plaintiff purchased the lands at tax sale on the 7th day of September, 1874, and has since paid the subsequent taxes thereon for the years 1874, 1875, 1876, and 1877.

On the 30th day of May, 1877, the county treasurer executed and delivered to the plaintiff treasurer's deeds for the lands, which failed to convey the title by reason of the treasurer's failing to attach thereto his official seal.

The defendants pleaded in their answer the five years statute of limitations, and set up that they had been in the open, notorious, adverse possession of the real estate as owners for more than ten years prior to bringing of the action.

It is stipulated in the agreed statement of facts that the tax deeds failed to convey the title to the premises for the reason they did not bear the treasurer's seal, and that the defendants have held and occupied the lands adversely for more than ten years as owners. The trial court found for the defendants and dismissed the cause.

It is obvious that the action is barred by the special limitation fixed by the statute for the foreclosure of tax liens. The deeds were void on their face and suit could have been brought to foreclose the same as soon as they were issued. An action to foreclose a tax lien is barred at the expiration of five years from the time the cause of action accrued. (*Helphrey v. Redick*, 21 Neb., 80; *Parker v. Matheson*, Id., 546; *Warren v. Demary*, *ante*, p. 327.)

The defense of adverse possession is also well taken. The doctrine is now firmly established in this state that

where a defendant in an action to foreclose a tax deed has been in the actual, open, exclusive, adverse possession of the land as owner for ten years, he thereby acquires an absolute title free from the lien created by the tax deed on the property, issued more than ten years prior to the commencement of the action to foreclose such tax deed. (*D'Gette v. Sheldon*, 27 Neb., 829; *Alexander v. Wilcox*, 30 Id., 793; *Alexander v. Meadville*, ante, p. 219.)

The judgment is

AFFIRMED.

THE other judges concur.

MONITOR PLOW WORKS V. RICHARD BORN ET AL.

[FILED JANUARY 12, 1892.]

1. **Negotiable Instruments: ONUS PROBANDI.** In an action upon a promissory note, where the answer is a general denial, the burden of proof is upon the plaintiff to establish the genuineness of the instrument, and this burden remains with him throughout the case.
2. ———: **ALLEGED FORGERY: EVIDENCE OF SIMILAR OFFENSE.** In an action upon a note claimed by the defendant to be forged, it is not competent for him to introduce evidence tending to prove that the payee had, at other times and unconnected with the note in suit, negotiated paper alleged to be forged.
3. **Reversible Error: THE ADMISSION OF INCOMPETENT TESTIMONY** on a jury trial, to the prejudice to the party against whom it is introduced, is good ground for reversal.

ERROR to the district court for Madison county. Tried below before POWERS, J.

S. O. Campbell, and *Barnes & Tyler*, for plaintiff in error, cited, contending that the admission of incompetent testimony was reversible error: *Dunbier v. Day*, 12 Neb.,

600; *High v. Bank*, 6 Id., 157; *Eiseley v. Malchow*, 9 Id., 180.

Allen, Robinson & Reed, contra, cited, as to the evidence of previous offense: 1 Greenleaf, Evidence [13th Ed.], sec. 53 n.; as to burden of proof: *First Natl. Bank v. Carson*, 30 Neb., 104; as to admission of testimony: *Dillon v. Russell*, 5 Neb., 484; *Polland v. Turner*, 22 Id., 366; *Brooks v. Dutcher*, Id., 644; *McClure v. Lavender*, 21 Id., 181; *Brown v. Klock*, 5 N. Y. Sup., 245; *R. Co. v. Turner*, 22 Pac. Rep. [Kan.], 414; *Hooker v. Brandon*, 43 N. W. Rep. [Wis.], 742; *Price v. Brown*, 20 N. E. Rep. [N. Y.], 381.

NORVAL, J.

This action was brought in the court below by the plaintiff in error against Richard Born and C. Neidig to recover the amount of a promissory note purported to be given by Richard Born to Neidig, and indorsed by the latter to the plaintiff. The petition is in the usual form.

Neidig answered, confessing the allegations of the petition. The answer of Richard Born is a general denial. The court entered judgment against Neidig for the full amount of the note and interest. The issue presented by the answer of the defendant Born was tried to a jury, who returned a verdict in favor of the defendant, and the plaintiff prosecutes error.

The defense is that the note is a forgery. The evidence bearing upon that question is conflicting and irreconcilable. The note is for \$500, bearing date September 8, 1883, due in two years and payable to the order of C. Neidig. It purports to be signed by Richard Born in the presence of Jacob Maurer.

The undisputed testimony is to the effect that at a public sale of cattle at the farm of one Henry Maurer, held on September 8, 1883, the defendant Richard Born purchased

over \$400 worth of stock, and gave in payment therefor his notes signed by Chris. Neidig as security. It was agreed at the time that Born should secure Neidig for signing the notes, which were given for the cattle. The next day after the sale Born and Neidig went to Maurer's, the former after the stock he had bought, and the latter to see about his security. While there, Born signed and gave Neidig some paper intended as security, which Born testifies was not a note, but was a chattel mortgage on certain cattle. The defendant is corroborated by several witnesses who were present at Maurer's house when the transaction occurred.

Richard Born also testified that he never signed the instrument in suit, nor authorized any one to sign his name thereto, and that shortly after the payment of the notes given for the cattle, he went to Neidig, to obtain the paper he had given him as security, and Neidig destroyed it in his presence. It is undisputed that Jacob Maurer did not sign the note as a witness to Born's signature.

As sustaining the genuineness of the note, there is in the bill of exceptions the testimony of C. Neidig, the payee of the note, that he saw the defendant sign it; the testimony of S. O. Campbell to the effect that he was well acquainted with the handwriting of Richard Born, and that the signature to the note was the genuine signature of Born, and that the defendant told the witness at one time he signed the note; and the testimony of Wm. Neidig, a former clerk of C. Neidig when he was in business in Madison, which is to the effect that he talked with the defendant about the note and in none of the conversations did Born claim that note was a forgery.

The only issue submitted to the jury was, Did the defendant sign the note?

The court charged the jury that burden of proof was upon the plaintiff to show by a preponderance of the evidence the execution and delivery of the note.

Monitor Plow Works v. Born.

It is claimed by counsel for plaintiff in error, in the brief, that after evidence had been introduced by the plaintiff to show the execution of the note, and that it was transferred to the plaintiff before due, and for a valuable consideration, the burden of proof shifted to the defendant to show that he did not sign the note. This contention is not well founded. The execution of the note declared upon was put in issue by the answer, and it devolved upon the plaintiff to establish the genuineness of the defendant's signature by a preponderance of the evidence, and this burden remained with the plaintiff throughout the case. (*First Natl. Bank v. Carson*, 30 Neb., 104.)

It is finally urged that the court erred in admitting, over the plaintiff's objection, the testimony of the witness Stuart.

James Stuart was called as a witness by the defendant, and after testifying that his occupation was banker and had been engaged in such business in Madison for about ten years, and that he was acquainted with Chris. Neidig, he testified on direct examination in answer to questions, as follows:

Q. Did you ever have in your possession commercial paper that was negotiated by the defendant Neidig, in this case, which was originally drawn to him as payee which was forged paper?

Objected to by the plaintiff, as incompetent, irrelevant, and immaterial, and that it is foreign to the question in issue in the case and tends to confuse the jury. Overruled and plaintiff excepts.

A. I had paper that the makers claimed they never signed, but Mr. Neidig was a signer on the paper, and not an indorser.

Q. He signed the paper as principal or surety?

A. As principal.

Plaintiff moves the court to strike out the last two answers of the witness for the reason that the testimony is incompetent. Motion overruled and plaintiff excepts.

Q. You may state if Mr. Neidig's attention was called to this paper and what the parties said about it; that they claimed that they had not signed it. Was his attention called to it by you?

A. Yes, sir; the man's name was John Fisher, who lived down the creek about three miles. The note purported to be signed by John Fisher, and John Fisher claimed that he did not sign it, but Neidig said that John had forgotten about it.

Q. Did you state to Neidig that Fisher said he had not signed the note?

A. Yes, sir; I said that this thing has got to stop right off.

Q. What did he say?

A. He coughed and hemmed, and said that Fisher had forgotten about it.

Plaintiff moved the court to strike out all the testimony of the witness relating to the Fisher note, for the reason that the same is incompetent, irrelevant, and immaterial, and not germane to the issue in the case. Overruled, and plaintiff excepts.

Q. You may state if there were any other notes of a like nature about that time.

Objected to by plaintiff, as incompetent, irrelevant, and immaterial. Overruled, and plaintiff excepts.

A. Yes, sir.

Q. What were they?

A. I think that one was a McCormick note, signed by Mr. Litke.

Q. What about that?

A. Why, they claimed they did not sign it, and Mr. Neidig took it up at once.

The admission of this testimony was clearly erroneous. It was the theory of the defense that the note in suit was forged by C. Neidig, and as tending to establish that fact it is claimed that the testimony complained of was compe-

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tent. It is not at all certain that the notes referred to by the witness Stuart were forged, only that the purported makers claimed they did not sign them. But conceding that the notes mentioned by Stuart in his testimony were not genuine, the proof of such fact could not, in any manner, tend to show that Born's name to the note in controversy was forged by Neidig. In other words, it was not competent to prove that, at another time and place, Neidig had committed the crime of forgery. (*Smith v. State*, 17 Neb., 358; *Cowan v. State*, 22 Id., 519; *Berghoff v. State*, 25 Id., 213.)

The evidence should have been confined to the issue on trial. Owing to the conflicting character of the testimony bearing upon the question of the genuineness of the note sued on, we cannot say the admission of the testimony of the witness Stuart was not prejudicial to the plaintiff. It may have turned the case in favor of the defendant. For the admission of this testimony the judgment is reversed and the case remanded for further proceeding.

REVERSED AND REMANDED.

THE other judges concur.

W. A. POLLOCK v. D. W. WHIPPLE.

[FILED JANUARY 12, 1892.]

Forcible Detention. THE FAILURE AND REFUSAL OF A TENANT TO PAY RENT according to the terms of his lease when due, in the absence of a stipulation to the contrary, terminates the lease and the tenant is liable to an action for forcible detention of the premises. (*Hendrickson v. Beeson*, 21 Neb., 61.)

ERROR to the district court for Cedar county. Tried below before NORRIS, J.

Barnes & Tyler, and *H. A. Miller & Son*, for plaintiff in error:

The lease contains no forfeiture clause; hence mere failure to pay rent did not work a forfeiture nor entitle the landlord to recover possession. (2 Taylor, Landlord & Tenant, 70; *Brown v. Bragg*, 22 Ind., 122; *Gaskell v. Trainer*, 3 Cal., 334.) His only remedy was an action for the rent and to protect his reversionary interests. (1 Taylor, L. & T., 189; 12 Am. & Eng. Ency. Law, 684.) Especially since there was no demand nor sufficient notice, he cannot claim a forfeiture. (*Woodward v. Cone*, 73 Ill., 241; *Brown v. Bragg*, 22 Ind., 122; *Estabrook v. Hughes*, 8 Neb., 501; *Callin v. Wright*, 13 Id., 558; *Chapman v. Wright*, 20 Ill., 125; *Johnson v. Douglas*, 73 Mo., 168.) *Hendrickson v. Beeson*, 21 Neb., 63, is not in point because there repeated demands were made and the tenancy was from month to month.

Lothrop & Dott, and *John Bridenbaugh*, *contra*, cited: *Uhl v. Pence*, 11 Neb., 316; *Hendrickson v. Beeson*, 21 Id., 63; *Scarlett v. Lamarque*, 5 Cal., 63.

NORVAL, J.

This is an action of forcible entry and detainer brought by the defendant in error before a justice of the peace of Cedar county. A trial was had, which resulted in a judgment of restitution for the plaintiff. The defendant appealed to the district court, where the cause was tried to a jury, with verdict and judgment for the plaintiff.

On the 9th day of December, 1885, David W. Whipple, a resident of Michigan, by written contract leased the farm in controversy to Sylvester K. Smith and wife, the son-in-law and daughter respectively of Whipple, for a period of four years, ending March 1, 1890. The contract stipulated that the tenants should pay as rent for the premises

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all the taxes assessed against the land for the years 1886, 1887, 1888, and 1889, also to board and lodge said Whipple, free of charge, at such time as he might be in Nebraska and should desire the same.

The tenants went into possession of the land under the lease, and so remained in possession until the 18th day of March, 1889, when, without the knowledge of the landlord, they assigned the lease to William A. Pollock, who took possession of the premises. Whipple came to Nebraska in April, 1889, when he first learned that the Smiths had abandoned the premises and left the county. None of the taxes had been paid, and the land had been sold for taxes of 1886 and 1887. Whipple thereupon demanded of Pollock that he carry out the lease by paying the taxes, which being refused, Whipple redeemed from the sale and paid the taxes for 1888, after which he made demand for possession, which being refused, this action was instituted.

The main question presented by the record arises upon the giving to the jury the plaintiff's fourth instruction, to the effect that a tenant holds over when he neglects or refuses to pay his rent, and upon the refusal of the court to give the defendant's third request, which reads as follows:

"The court instructs the jury that a default in the payment of rent does not work a forfeiture of the term, unless the lease provides for a re-entry in case of default in payment of rent."

It is insisted that, as the lease contained no forfeiture clause, a failure to pay rent did not have the effect to work a forfeiture of the term.

Section 1021 of the Code provides that "a tenant shall be deemed to be holding over his term whenever he has failed, neglected, or refused to pay the rent or any part thereof when the same was due," etc.

The provision of this section was construed by the court in *Hendrickson v. Beeson*, 21 Neb., 61. It was there held,

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after a careful consideration of the question, that "in the absence of a stipulation to the contrary, when a tenant fails and refuses to pay rent according to the terms of his lease, when due, such refusal terminates the lease, and by section 1021 of the Civil Code he is holding over his term and liable to an action for the forcible detention of the property." It was further decided that in such case the only notice required is the statutory three days' notice to quit.

We do not think any other construction could be given to the section of the statute quoted. It is quite immaterial that the contract contained no stipulation of forfeiture or right of the landlord to re-enter in case of a non-payment of the rent reserved. Contracts of lease must be construed with reference to this provision of the statute.

It is claimed that the lease specified no time for the payment of the taxes, and their payment could be made at any time before the expiration of the lease. We do not so construe the provisions of the lease. The contract was for a period of four years, by which the tenants agreed to pay as rent the taxes assessed on the property for each year during the continuance of the lease. It was the duty of the tenants to pay the taxes each year before they became delinquent. The property was permitted to be sold for the taxes assessed for two years, and the landlord was compelled to redeem from the tax sale. The lease was therefore forfeited when it was assigned to Pollock.

There is evidence tending to show that Whipple was not aware that the taxes had not been paid until after the Smiths had abandoned the premises, and that shortly afterwards he informed Pollock, if he would pay the taxes, he would allow him to retain the premises for the remainder of the term. Pollock declined to pay them. He had no right to refuse to pay the rent reserved by the lease and still retain possession of the premises. The judgment is

AFFIRMED.

THE other judges concur.

33	756
42	904
43	778
33	756
47	61

FRANK PETALKA, APPELLANT, V. FRANK FITLE ET
AL., APPELLEES.

[FILED JANUARY 12, 1892.]

1. **Judgments: INSUFFICIENT FINDINGS.** A judgment is not void for want of a finding of fact to support it. While it is erroneous and subject to reversal by proper proceedings brought for that purpose, yet the lack of such a finding is no cause for enjoining the collection of the judgment.
2. ———: **INJUNCTION.** A judgment at law, valid on its face, will not be enjoined on behalf of the defendant against whom it was rendered, when it does not appear that he has a valid defense to the cause of action upon which the judgment was entered.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

Slabaugh, Lane & Rush, for appellant, cited: *Blanchard v. Jamison*, 14 Neb., 244; *Ridgeway v. Bank*, 30 Tenn., 523; *McNeill v. Edie*, 24 Kan., 108; *Mastin v. Gray*, 19 Id., 458; *Chambers v. Mfg. Co.*, 16 Ark., 270; *Ryan v. Boyd*, 33 Kan., 778; *Owens v. Ransiead*, 22 Ill., 161; *Gerrish v. Hunt*, 66 Ia., 682; *Blakeslee v. Murphy*, 44 Conn., 188.

Jas. W. Carr, *contra*, filed no brief.

NORVAL, J.

This action was brought in the court below by appellant for the purpose of enjoining an alleged void judgment which the appellee Fitle had obtained against him in the justice court of E. K. Wells, a justice of the peace in and for Douglas county, and an execution issued thereon, which had been placed in the hands of Martin Eddy as constable and which he was about to levy upon the property of appellant.

Petalka v. Fittle.

The plaintiff alleges in his petition: "That on the 21st day of February, 1888, the defendant herein recovered an invalid judgment against the plaintiff herein in the justice court of E. K. Wells, justice of the peace in and for Douglas county, Nebraska, for the sum of \$60 and \$7.90 costs of suit, in an action pending in said court wherein, the said Frank Fittle was plaintiff and the plaintiff herein, Frank Petalka, was defendant. A transcript of said invalid judgment is filed herewith, marked 'Ex. A,' and made a part hereof.

"The plaintiff alleges that there is error in said proceedings and in said record, and that said pretended judgment is invalid for the following reasons, to-wit:

"1st. That said defendant therein had not been summoned or in any way notified to appear at the hour said trial was had, but that said justice was absent from his office, the place of said trial, at the hour said Petalka was summoned to appear, and was absent from said place six or eight hours thereafter, and that the plaintiff did not appear for several hours later.

"2d. That the judgment of said suit, as appearing in the transcript filed herewith, is invalid, and that no legal judgment exists in favor of the defendant herein and against the plaintiff herein.

"3d. That said justice had no jurisdiction of the parties hereto at the time of rendering said judgment.

"That the defendant herein threatens to enforce said judgment by execution; that said justice has issued an execution out of his court on said judgment against the plaintiff herein, and delivered the same to Martin Eddy, constable, who is about to levy upon and sell under said execution the goods and chattels of the plaintiff herein.

"That the defendant herein is insolvent, and if he be allowed to enforce said judgment and collect thereon, the plaintiff herein would be irreparably injured."

No answer was filed, and the cause was submitted to

Petalka v. Fille.

the court upon the petition and evidence, on consideration thereof the court found the issues in favor of the defendants and dismissed the action for want of equity.

As the defendants failed to deny the averments of the petition, every allegation of facts contained in the petition must be taken as true. Was the petition sufficient to entitle the plaintiff to equitable relief?

The transcript of the judgment rendered by the justice of the peace, which is attached to and made a part of the petition, shows that on the 14th day of February, 1888, the justice issued a summons for Frank Petalka returnable February 21, 1888, at 1 o'clock P. M., which was personally served upon Petalka on the day it was issued. The transcript also states that the defendant did not appear at the hour fixed for trial, nor for one hour thereafter, when the case was called, trial had, and judgment rendered for plaintiff for \$60 and costs. The justice court had jurisdiction of the subject-matter of the action, and it appears from the transcript of the judgment that jurisdiction was had of the person of the defendant. So no want of jurisdiction appears upon the face of the judgment. The sole defect in the record is that it contains no finding of fact. But the want of a finding does not render the judgment void. It is merely erroneous, and would be sufficient grounds for reversal in proper proceedings brought for that purpose. (*Hansen v. Bergquist*, 9 Neb., 278; *Doty v. Sumner*, 12 Id., 378; *McNamara v. Cabon*, 21 Id., 589; *Connelly v. Edgerton*, 22 Id., 82.)

Relief is asked upon the ground that the trial was had and judgment rendered several hours after the time fixed in the summons for Petalka to appear. But this alone is not sufficient cause for enjoining the collection of the judgment. The judgment shows that it was rendered in the absence of Petalka. He was therefore entitled under the statute, as a matter of right, to have the same set aside, by making application to the justice within ten days

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after the judgment was rendered, and confessing judgment for the costs or paying the same. Had such motion been made and denied, he could have prosecuted appeal on error therefrom to the district court. He did not avail himself of the remedy provided by statute.

The plaintiff does not allege in his petition sufficient facts to show that it would be inequitable to permit the judgment to be enforced. It does not appear that Petalka has any defense to the action in which judgment was rendered against him. The rule is well settled that a court of equity will not enjoin a judgment at law, regular on its face, on behalf of the defendant against whom the judgment had been rendered, unless it appears he has a valid defense, which he was prevented from making, by reason of fraud, accident, or circumstances beyond his control. *Schofield v. State Bank*, 9 Neb., 316; *Gould v. Lougham*, 19 Id., 392; *Proctor v. Pettitt*, 25 Id., 96; *Winters v. Means*, Id., 241; *Osborne v. Gehn*, 29 Id., 661.)

The petition failing to state sufficient grounds for equitable relief, the district court did not err in dismissing the action. The judgment is

AFFIRMED.

THE other judges concur.

R. V. & W. R. Co., APPELLEE, v. CHASE COUNTY ET AL., APPELLANTS.

[FILED JANUARY 13, 1892.]

Taxation: RAILROADS: UNIMPROVED RIGHT OF WAY. A railway company owns a right of way, grading, culverts, etc., running through two or more counties of the state. It has owned this right of way for years but there is no superstructure thereon. *Held*, That under section 39 of the revenue law, the right of way, etc., was subject to assessment by the local assessors, and that a petition to enjoin taxes so levied would be dismissed for want of equity.

APPEAL from the district court for Chase county.
Heard below before COCHRAN, J.

G. W. Watters, for appellants, cited: *C. B. & Q. R. Co. v. Paddock*, 75 Ill., 616; *San F. N. & B. R. Co. v. Bd. of Equalization*, 60 Cal., 12; *Dundy v. Richardson*, 8 Neb., 508; *S. Platte Co. v. Crete*, 11 Id., 344; *Thatcher v. Adams Co.*, 19 Id., 485; *Appelgate v. Ernst*, 3 Bush [Ky.], 646; *V. & T. R. Co. v. Washington Co.*, 30 Gratt. [Va.], 481; *Cass Co. v. R. Co.*, 25 Neb., 356.

W. S. Morlan, and *Marquett & Deweese*, contra, cited: *B. & M. R. R. Co. v. Lancaster Co.*, 7 Neb., 35; 15 Id., 251; *Red Willow Co. v. R. Co.*, 26 Id., 660.

MAXWELL, CH. J.

A demurrer to the petition was overruled in the court below, and the injunction made perpetual. The petition is as follows:

"The plaintiff respectfully represents that it is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, and that as such it has procured the right of way for a line of railroad running from Culbertson, in Hitchcock county, northwestwardly through that county, and through the county of Hayes, and the county of Chase, and has built and graded a road-bed thereon, and partially completed the construction of the road by the laying of ties and rails, and the building of culverts, bridges, etc., over a portion of said line, the balance of which still remains uncompleted so far as laying the ties and rails is concerned, but the road-bed has been graded through those counties, and it is the intention of the said railroad to complete the construction of the same for the running and operation of cars, trains, and engines thereon in the usual manner of the construction of railroads

for use in the operation of trains as a common carrier in the state of Nebraska; that said line of right of way through Chase county was procured in the months of May to October inclusive, 1887, and the grade or railroad bed was built and constructed thereon in the months of July to December inclusive, 1887, and said line of right of way and railroad grade has been the property of the plaintiff ever since the same was procured and constructed as above stated.

"Second—The plaintiff further alleges that for the year 1888 the county officers and local taxing officers of the county procured an assessment to be made by the precinct assessors in said county upon the right of way and grade of said line of railroad in said county, and levied a tax thereon, and spread the same upon the records of said county as a tax against this plaintiff; that the total valuation placed upon said right of way and grade for the said line of railroad in said county for said year was the sum of \$41,000, and the total amount of tax levied thereon for the said year by the local taxing officers of said county was and is the sum of \$1,200.33, which was and is spread upon the records of said county as a tax lien against the property of this plaintiff.

"Third—Plaintiff further alleges that for the year 1889 the local taxing officers of said county procured an assessment to be made upon the right of way and grade of said line of railroad by the precinct assessors of the various precincts through which said line of road is located and built, which assessment for the said year amounts as a whole to the sum of \$——, and that the local taxing officers of said county levied a tax upon said year of 1889, and spread the same upon the records of said county as a tax and lien against the property of this plaintiff, which tax amounts for the year 1889 to the sum of \$1,395.46, which tax still stands on the records of said county as an apparent lien upon the property of this plaintiff.

"Fourth—The plaintiff alleges that the said county of

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Chase, through its officers and assessors, had no authority of law for the assessment of said property and the levying of a tax on said right of way and railroad grade; that said property was not taxable, but under the law could only be valued and assessed for taxation, if at all, for said years, by the state board of equalization, and that the pretended assessment and taxation of the same by the local taxing officers of Chase county is null and void and of no effect in law, other than to create an apparent lien and cloud upon the property of the plaintiff.

"Fifth—The plaintiff further alleges that the said taxes so levied by the local taxing officers of Chase county have been spread upon the records of said county as a tax lien against the property of this plaintiff, and that the said county, through its officers, and through the said R. A. Ewing as treasurer of said county, have threatened to proceed to the collection of said taxes by process of law, and that unless they are restrained the said county, through its officers, will proceed to collect the said taxes thus levied by them on the property of this plaintiff, by advertisement and sale; that this plaintiff has no remedy at law to prevent the said county and the said treasurer and its officers from collecting the said taxes by distress and sale, and that it would suffer great and irreparable damages if they are allowed to proceed in the collection of the same.

"Wherefore plaintiff prays that a writ of injunction may be issued restraining the said county and the said R. A. Ewing, as treasurer of said county, and all other officers and agents of said county, from in any manner interfering with or intermeddling with the property of this plaintiff, and to restrain them, and each of them, from collecting the said taxes or any portion thereof, and from taking any steps under the law for that purpose, and that on the final hearing of said cause the said taxes may be declared null and void and of no lien or effect on the property of or against this plaintiff, and that said temporary injunction

may be made perpetual, together with such other and further relief as the plaintiff is in equity entitled to."

Section 39 of the revenue law provides "That the president, secretary, superintendent, or other principal accounting officers within this state of every railroad or telegraph company, whether incorporated by any law of this state or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list and return to the auditor of public accounts for assessment and taxation, verified by the oath or affirmation of the person so listing, all the following described property belonging to such corporation on the first day of April of the year in which the assessment is made within this state, viz., the number of miles of such railroad and telegraph line in each organized county in this state, and the total number of miles in the state, including the road-bed, right of way, and superstructures thereon, main and side tracks, depot buildings, and depot grounds, section and tool houses, rolling stock, and personal property necessary for the construction, repairs, or successful operation of such railroad and telegraph lines; *Provided, however,* That all machine and repair shops, general office buildings, storehouses, and also all real and personal property outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies shall be listed for purposes of taxation by the principal officers or agents of such companies, with the precinct assessors of any precinct of the county where said real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property."

It will be observed that the right of way, with the grading, bridges, culverts, etc., is not mentioned in the above section. The number of miles of railroad and telegraph line is to be given, which should include the road-bed, right of way, and superstructures thereon, main and

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side tracks, depot buildings and depot grounds, section and tool houses, rolling stock, etc. In other words, a railroad running through two or more counties, with its equipment, is to be assessed as a whole by the state board. But all machine and repair shops, general office buildings, storehouses, together with all real estate and personal property outside of the right of way and depot grounds, shall be assessed by the assessors of the proper precincts. The second section of the revenue law exempts from taxation the property of the state, counties, and municipal corporations, property used exclusively for agricultural and horticultural societies and for school, religious, cemetery, and charitable purposes, etc. There is a qualified exemption for fruit and forest trees, etc., which need not be noticed. All other property in the state is taxable. In the case at bar the road-bed, grading, culverts, etc., have existed for years. They do not constitute a railroad. At the most they are but parts of the road. The legislature evidently did not contemplate a state of affairs like that set forth in the petition. It is to be supposed where a right of way is obtained and the grading done it is *bona fide* and with the intent to construct a railroad then—not five or ten years afterwards. The right of way in many cases, no doubt, was obtained for a trifle or for nothing from persons who were struggling with the hardships and privations incident to pioneer life, but were public-spirited and hoped by the construction of the road to receive advantages from the increase in value of their own and their neighbor's property. This property in most cases was taxable before it was taken, and it does not lose that character by being converted into right of way. There is no claim that the assessment is unjust or that the tax is inequitable. There is no equity in the bill. The judgment of the district court is

REVERSED AND THE ACTION DISMISSED.

THE other judges concur.

MATT MILLER V. ROBT. WHEELER.

J. C. CRAWFORD V. W. F. NORRIS.

[FILED JANUARY 20, 1892.]

1. **Elections: CONTEST: SUPREME COURT: ORIGINAL JURISDICTION.** In an action to contest the election of certain judges of the district courts. *Held*, That the limitation in sec. 2, art. 6 of the constitution of the original jurisdiction of the supreme court to cases relating to the revenue, civil cases in which the state shall be a party, *mandamus, quo warranto*, and *habeas corpus* was a prohibition upon the power of the court to entertain original jurisdiction in other cases, and that a contest of election is essentially a judicial proceeding.
2. ———: ———: ———. There is no power in the legislature to constitute the supreme court a board to try contests of elections, as the powers and duties of the court are essentially judicial in their nature and cannot be perverted from that purpose.

ORIGINAL proceedings to contest election of district judges.

S. H. Steele, and *G. W. Simpson*, for contestant Miller:

The legislature may increase the original jurisdiction of the supreme court unless prohibited by the constitution. (Cooley, Const. Lim., 206.) Hence the law granting jurisdiction herein is valid. (*Harris v. Executor*, 21 N. J. Eq., 424; *Shaw v. Hill*, 67 Ill., 456; *Broadwell v. People*, 76 Id., 555; Brown, Jurisdiction, sec. 13; Wells, Jurisdiction, 53; *Bell v. Templin*, 26 Neb., 249.) A state law is presumably valid in any case, and this presumption is a conclusive one unless in the constitution of the United States, or of the state, we are able to discover that it is prohibited. (Cooley, Const. Lim., 206, 216.)

M. McLaughlin, for contestant Crawford, after contending that the principle claimed by contestee would, under sec.

33	765
37	432
33	765
46	738
33	765
47	582

Miller v. Wheeler.

1, art. 6, Const., prevent the establishment of other tribunals than those there enumerated, cited also, as adverse to the claim: *State v. Oleson*, 15 Neb., 247; *Bell v. Templin*, 26 Id., 249; *State v. Saline Co.*, 18 Id., 428; *Steele v. Martin*, 6 Kan., 431.

George B. France, and *R. S. Norval*, for contestee, Wheeler:

The court should decline to take cognizance of the case, as it is in form of an original action and does not invoke appellate jurisdiction. (*Vail v. Dinning*, 44 Md., 210; *Foster v. State*, 41 Id., 61; *State v. Flentge*, 49 Id., 488; *Marbury v. Madison*, 1 Cranch [U. S.], 139). The maxim *Expressio unius est exclusio alterius* applies. (*Bell v. Templin*, 26 Neb., 262; *Paulson v. State*, 25 Id., 344-47; *Kent v. Mahaffy*, 2 O. St., 498; *State Bank of Ohio ex parte*, 1 Id., 432; *Wheeler v. Lynn*, 8 Id., 393; *P., Ft. W. R. Co. v. Hurd*, 17 Id., 144; *Knapp v. Thomas*, 39 Id., 377-83; *Cleghorn v. Waterman*, 16 Neb., 225; *Campbell v. Campbell*, 22 Ill., 664; *Crull v. Keener*, 17 Id., 246; *Plumleigh v. White*, 4 Gil. [Ill.], 387; *Chicago v. Iron Works*, 2 Brad. [Ill.], 189; *L. & S. R. Co. v. Luz*, 63 Ill., 523.)

Barnes & Tyler, *C. C. McNish*, *Jay & Beck*, and *Uriah Bruner*, for contestee Norris, cited: *Curtis*, Juris. of U. S. Courts, 8; *Commonwealth v. Commissioners*, 37 Pa. St., 237; *Gibson v. Templeton*, 62 Tex., 555; *State v. Bank*, 5 Sneed [Tenn.], 573; *Ward v. Thomas*, 2 Cold. [Tenn.], 565; *Gibson v. Emerson*, 2 Eng. [Ark.], 172; *State v. Jones*, 22 Ark., 331; *Haight v. Gray*, 8 Cal., 297; *Deek v. Gherke*, 6 Id., 666; *Zander v. Coe*, 5 Id., 230; *P., F. W. & C. R. Co. v. Hurd*, 17 O. St., 144; *Durousseau v. U. S.*, 6 Cranch [U. S.], 307; *U. S. v. More*, 3 Id., 159; *Ex parte Knowles*, 5 Cal., 300; *Ferris v. Coover*, 11 Id., 175; *Greedy v. Townsend*, 25 Id., 604; *Powell v. Spaulding*, 3 Greene [Ia.], 417; *Perkins v. Testement*, Id., 207-8; *State v. Al-*

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len, 5 Kan., 213; *Att'y Gen'l v. Messmore*, 14 Wis., 121, 177; *Cleghorn v. Waterman*, 16 Neb., 225; *Paulson v. State*, 25 Id., 344; *Bell v. Templin*, 26 Id., 249; *State v. School Dist.*, 10 Id., 477; *Tecumseh v. Phillips*, 5 Id., 305; *White v. Lincoln*, Id., 505; *State, ex rel. Jones, v. Lancaster Co.*, 6 Id., 474; *B. & M. R. Co. v. Sanders Co.*, 9 Id., 507; *Hamlin v. Meadville*, 6 Id., 234; *Ives v. Norris*, 13 Id., 254; *Ex parte Thompson*, 16 Id., 239; *Herold v. State*, 21 Id., 50; *State v. Van Duyn*, 24 Id., 591; *Messenger v. State*, 25 Id., 676.

MAXWELL, CH. J.

The plaintiff Miller contests the right of Wheeler to the office of judge of the district court of the fifth judicial district. The plaintiff Crawford contests the right of Norris to the office of judge of the eighth district.

In each of these cases a petition has been filed in this court and the proceedings for contest instituted herein. Each of the defendants demur to the petition of contest upon the ground that the court has no authority as a court of original jurisdiction to hear and determine the cases. As the same question is presented in each of the cases they will be considered together.

Sec. 2, art. 6, of the constitution provides that "The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum, or to pronounce a decision. It shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, *habeas corpus*, and such appellate jurisdiction as may be provided by law."

In *Bell v. Templin*, 26 Neb., 249, an original action was brought in this court to contest the right of a county attorney, and the defendant demurred to the petition for want of jurisdiction. It was held that a county attorney being a county officer the proceedings should be instituted

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in the county court of the proper county. In that case it is said, "Where, however, the district comprises a number of counties or the entire state it is necessary to provide a tribunal with wider powers than is possessed by the tribunal spoken of in either section 70 or 71 of chapter 26, Compiled Statutes; hence it is sought to confer this power on the supreme court. The supreme court undoubtedly has power in actions of *quo warranto* and probably in a proceeding to contest an election in any of the cases mentioned in section 69, chapter 26. The original jurisdiction of the supreme court in judicial proceedings is fixed by sec. 2, art. 6, of the constitution, and is limited to cases relating to the revenue, *mandamus*, *quo warranto*, *habeas corpus*, and cases in which the state shall be a party. The designation of these cases in which the court has original jurisdiction is a direct prohibition of jurisdiction in other cases. The maxim, '*Expressio unius est exclusio alterius*,' applies and excludes original jurisdiction in other cases. The supreme court is intended as a court of review, the principal business being a re-examination of the judgments of the district courts. The original jurisdiction is conferred on this court in a limited number of cases to enable the court to protect the rights of parties where other means would seem to be inadequate and to prevent a failure of justice. A tribunal to determine contested elections need not be, strictly speaking, a judicial body, the powers exercised being political and administrative. (*State v. Oleson*, 15 Neb., 247; *State v. Saline County*, 18 Id., 428.) There is but little doubt, therefore, that the legislature may constitute the supreme court a tribunal to decide contests of election in cases where officers are elected by the entire state, or by a number of counties constituting a district thereof. This question, however, does not arise in this case.

Both of my associates are of the opinion that a contest of election is a judicial proceeding as much so as an action

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of *quo warranto*, and that therefore the court has no original jurisdiction, and on mature reflection I think their views are correct. The question did not arise in *Bell v. Templin*, but the writer having in mind the cases of *State v. Oleson*, 15 Neb., 247, and *State v. Saline County*, 18 Id., 428, wherein it was held in substance that a tribunal for the trial and removal of an officer for dereliction of duty need not strictly be a court, expressed his views as above. A more careful examination of the statute and the constitution, however, convinces the writer that the original jurisdiction of the supreme court is confined to the cases specified in the constitution, and that under another name no additional jurisdiction can be conferred. This is a court the primary object of which is to review cases tried in the district courts. It is an appellate tribunal and it is given original jurisdiction in a few limited cases, most of which are extraordinary remedies for the purpose of preventing a failure of justice. It is argued with considerable force that this proceeding is a branch of the action of *quo warranto*; in fact is such action in all but in name. It is sufficient to say that it is not an action of *quo warranto*, and it is unnecessary to point out the differences between the two. It is evident that the court has no original jurisdiction in this class of cases. Neither can the legislature clothe this court with power as a board to hear contest of election cases, as the duties of the court are essentially judicial and cannot be perverted from that purpose. The demurrer must therefore be sustained and the actions

DISMISSED WITHOUT PREJUDICE.

THE other judges concur.

EDWIN W. MOSHER V. LEONARD NEFF ET AL.

[FILED JANUARY 20, 1892.]

Husband and Wife: ACTION TO SET ASIDE DEED. One N. purchased certain lands with money belonging to his wife and took the deed therefor in his own name. Soon afterwards he signed a note as surety in order that the principal might obtain an extension of time of payment. After the note became due judgment was recovered thereon and a transcript thereof filed in the proper court to become a lien on the land and an execution was thereupon issued and levied thereon. After the recovery of the judgment, but before the sale thereof, N. conveyed the land in question to a trustee who conveyed to his wife, who brought an action to establish her rights therein. The court below having found in favor of the wife, *held*, that the judgment was right, and is affirmed.

APPEAL from the district court for York county. Heard below before NORVAL, J.

Sedgwick & Power, for appellant, cited: *Roy v. McPherson*, 11 Neb., 198; *Aultman v. Obermeyer*, 6 Id., 260; *Hoagland v. Wilson*, 15 Id., 320; *Thompson v. Loenig*, 13 Id., 387; *Atkins v. Atkins*, 18 Id., 476; *Fisher v. Herron*, 22 Neb., 185; *Bogart v. Fisher*, Id.; *Bartlett v. Cheesbrough*, 23 Id., 771; *Grimes v. Sherman*, 25 Id., 848.

R. S. Norval, contra.

MAXWELL, CH. J.

This was an action in equity in the district court of York county to set aside deeds of forty acres of land from the defendant Leonard Neff to one Dally, and from Dally to the defendant Lydia Neff, who is the wife of Leonard Neff. Judgment in the district court was rendered in favor of the defendants, from which the plaintiff appeals to this court. After the defendants had answered, the

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plaintiff filed an amended petition and also an amended reply. The original bill of exceptions is attached to the record, which contains all of the evidence offered on the trial of the cause.

The evidence shows that about nine years before the trial of this cause the defendants Leonard Neff and Lydia Neff, who were husband and wife, and who were then and have ever since been living together as such, came to Seward county from Illinois and soon after purchased a homestead of 160 acres of land in Seward county, upon which they have resided since 1881 or 1882. According to the defendant's evidence this homestead was bought by both parties, some payments being made by one and some by the other. In 1879 one Dewey had a contract from the railroad company for the purchase of eighty acres of land in York county, which included the forty acres in question, and the defendant Leonard Neff bought the contract of Dewey and took an assignment directly to himself. (He says that he had some of his wife's money to invest and wanted Dewey to make the assignment to her instead of himself, but this was not done.) On the 5th day of June, 1883, the railroad company deeded the land to the defendant Leonard Neff, and the deed was recorded August 4, 1884.

On the 20th day of December, 1883, one Henry W. Brooks, who is a son-in-law of these defendants, was indebted to one Wm. A. Sharrar upon two promissory notes which were past due, and to obtain an extension of time of payment procured the defendant Leonard Neff, to sign said notes with him, and time of payment was extended to the 1st day of February, 1884. On March 4, 1884, action was brought in the county court of Seward county on said notes against Brooks and the defendant Leonard Neff, The summons was served on both defendants March 26. 1884, the case was continued from time to time, and the issues made up and finally tried August 12, 1884, and

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judgment for plaintiff for \$280; a transcript of this judgment was duly docketed in the district court of York county on the 14th day of August, 1884.

Execution was issued to the sheriff of York county and levied upon the forty acres in question and the same was sold by the sheriff on February 18, 1885; the sale was duly examined and confirmed by the court and deed ordered; the deed was executed by the sheriff to William A. Sharrar and this plaintiff claims through him. While the action was pending in the county court of Seward county, the defendant Leonard Neff deeded the land in question, together with the homestead in Seward county, to one Dally who on the same day deeded the same to the defendant Lydia Neff. The defendant Lydia Neff answers that the land in question was bought with her money and is her land; the plaintiff in his amended reply alleges that the money which bought the land was Mr. Neff's and that Lydia Neff is now estopped to claim the land as against creditors whose claims originated while the land purported to be the property of Leonard Neff, or who trusted Mr. Neff on the faith and credit of this land.

The record clearly shows that the debt upon which the judgment was recovered was not contracted by Mr. Neff, nor in reliance upon his being the owner of the property in dispute. The debt was that of a son-in-law, Brooks by name, and although the extension of the time of payment would be a sufficient consideration to hold the surety liable, yet there is no claim that the plaintiff lost any opportunity or advantage in the collection of his claim from Brooks by extending the time of payment. So far as we can judge the debt could not at any time have been collected from Brooks.

On the trial of the cause the court below found the issues in favor of Mrs. Neff and rendered a decree accordingly. The testimony clearly shows that the money that paid for the land in controversy belonged to Mrs. Neff

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and that she was in fact the owner of the land in dispute. It is unnecessary to review the testimony at length. The judgment is right and is

AFFIRMED.

POST, J., concurs.

NORVAL, J., took no part in the decision.

A. E. ALEXANDER V. IRA A. MEYERS ET AL.

[FILED JANUARY 20, 1892.]

33	773
41	199
33	773
53	159
33	773
57	615

1. Statute of Limitations: MUST BE SPECIALLY PLEADED.

In an action to foreclose a tax lien for taxes paid in 1872, 1873, and 1874, the court below found the tax deeds void, and rendered a decree for the taxes and interest. One of the defendants filed no answer, and the other attempted to plead adverse possession but failed to allege that he had been in the exclusive possession of the property. *Held*, That the statute of limitations must be pleaded either by demurrer or answer, or its protection will be waived.

2. Review. No error appearing in the record the judgment is affirmed.

APPEAL from the district court for Cass county. Heard below before FIELD, J.

Wm. L. Brown, for appellant, cited: *Parker v. Mathewson*, 21 Neb., 547; *Helphrey v. Redick*, Id., 83; *D'Gette v. Sheldon*, 27 Id., 829; *Alexander v. Wilcox*, 30 Id., 793.

S. P. Vanatta, contra.

MAXWELL, CH. J.

This action was brought in the district court of Cass county to foreclose a tax lien on lots 15, 17, and 18, in

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Stadleman's addition to the city of Plattsmouth. It is alleged that the taxes were paid for the years 1872, 1873, and 1874. The defendant Billings filed an answer as follows:

"Comes now the defendant in the above entitled cause and for his separate answer to the petition of the plaintiff filed herein states that he is the owner in fee simple of the following described real estate set out in plaintiff's petition; admits that the pretended deed mentioned in plaintiff's petition as the one executed by the treasurer of Cass county, Nebraska, to said Merriam, failed to convey the title to said lots as alleged in plaintiff's petition, and alleges that neither said Merriam nor his grantees ever had or acquired any title to said lots by reason of said pretended deed; denies that plaintiff has any right or title to, or lien upon said lots.

"This answering defendant for a further defense to plaintiff's petition alleges that at the time of said pretended sales and each of them, this defendant was the owner in fee simple of the real estate described in this separate answer, and that before, at, and subsequent to the time of said sales, and each of them, this defendant had in the county where said land is situated a sufficient amount of personal property that could have been distrained and sold for such taxes.

"This answering defendant, for a further defense to said petition, alleges that he has been in the actual, open, notorious, continuous, and adverse possession of said premises and the occupancy thereof for more than ten years last past prior to the filing of plaintiff's petition, and more than ten years elapsed between the execution of said pretended tax deed or the commencement of this action."

It will be observed that Billings does not allege that he had been in the exclusive possession of any of the property, and there is no description of the lots he professes to own.

There is no answer of Meyers in the record.

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On the trial of the cause the court below found that Meyers was the owner of lot 15 and Billings of lots 17 and 18 in said addition. The court also found that there was due the plaintiff the sum of \$183 for taxes and interest thereon, and allowed \$18 as an attorney's fee, and declared the same a lien on the land, and ordered the payment of said sum in ninety days or said lots should be sold.

It will be observed that there is no plea of the statute of limitations except that an action for the recovery of the land is barred, and all that is there alleged may be true and still the action not be barred, as it is not alleged that the defendant Billings had the exclusive possession. It is well settled that the objection that an action is barred by the statute of limitations must be raised either by demurrer or answer or it will be waived. (*Towsley v. Moore*, 30 O. St., 195; *Sturges v. Burton*, 8 Id., 215; *McKinney v. McKinney*, Id., 423.) As to Moore, there is no attempt to plead the statute; and as to Billings, the plea is insufficient. The judgment is therefore

AFFIRMED.

THE other judges concur.

OMAHA & FLORENCE LAND & TRUST CO. v. JAS. M.
PARKER.

[FILED JANUARY 20, 1892.]

1. **Adverse Possession: REQUISITES: AGENTS.** To entitle a party to claim by adverse possession, he must have made an actual entry upon the lands and occupied the same as owner. This occupancy, however, may be continued by his agents and servants.
2. ———: ———. The possession must be actual, notorious, continuous, and exclusive, and may be by fencing and pasturing the land, cultivation, etc., and the payment of taxes.

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3. **Limitations of Actions: ABSENCE FROM STATE.** To prevent the running of the statute of limitations against a party who has removed from the state the absence must be such as will prevent the bringing of an action against him during such absence. If there is no suspension of the right to bring and maintain a suit, the running of the statute will not be interrupted.
4. **Ejectment: ABSENCE OF PART OF DEFENDANTS FROM STATE.** An action to recover the possession of land may be brought against those in possession thereof although some of the parties may be absent from the state.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Congdon & Hunt, for plaintiff in error:

This is an action *in personam* and does not fall within sec. 17 of the Code. (*Mankin v. Chandler*, 2 Brock. [U. S.], 125; *Mills v. Caldwell*, 2 Wall. [U. S.], 41; *Watkins v. Reed*, 30 Fed. Rep. [Kan.], 908; Wood, Lim. Actions, sec. 252; *Bass v. Bass*, 6 Pick. [Mass.], 362; *Jordan v. Robinson*, 15 Me., 167; *Keith v. Estill*, 9 Port. [Ala.], 669; *Bedell v. Janney*, 4 Gilm. [Ill.], 193; *Elder v. Bradley*, 2 Sneed [Tenn.], 247.) An employe is not an occupant within the rule governing ejectment. (*Chiniquy v. Bishop of Chicago*, 41 Ill., 148; *Hawkins v. Reichert*, 28 Cal., 534; *Doe v. Staunton*, 1 Chitty [Eng.], 119.)

Lake & Hamilton, contra:

The modern action of ejectment is one *in rem*. (Washburn, Real Prop., 464, and cases; Maxwell, Pl. & Pr., 610, and cases; *Pennoyer v. Neff*, 5 Otto [U. S.], 715; *Peters v. Dunnells*, 5 Neb., 465; *Williams v. Lowe*, 4 Id., 397; *Gartrell v. Stafford*, 12 Id., 547; *Atkins v. Atkins*, 9 Id., 202; *Watkins v. Reed*, 30 Fed. Rep. [Kan.], 908; *Lejeune v. Harmon*, 29 Neb., 268; *Arndt v. Griggs*, 10 S. Ct. Rep. [Neb.], 557.) During Parker's absence, his son was in charge of the premises and was a proper party defendant. (*Cunningham v. Brumback*, 23 Ark., 336;

Hendricks v. Rasson, 44 Mich., 104; *Hawkins v. Reichert*, 28 Cal., 535; *Hunton v. Nichols*, 55 Tex., 217.)

MAXWELL, CH. J.

This action was brought in the district court of Douglas county by the plaintiff against the defendant to recover the possession of "outlots" 226 and 227 in the city of Florence. The answer contained, first, "a general denial"; second, "a plea of title in the defendant, and the statute of limitations." To this answer a reply was filed setting forth, among other things:

"First—A denial that the statute had barred the action.

"Second—Further replying, plaintiff alleges that said defendant is now, and for fifteen years last past has been, a non-resident of Nebraska, and has visited this state at intervals, remaining here but a few days at a time, the aggregate of which time, during said period, would not exceed ninety days.

"Third—That the lots described in the answer lie within a general inclosure, including eighty acres and upwards, composed of numerous and similar lots, some of which defendant owns in fee, others he holds as co-tenant of an undivided moiety, and others still that he neither holds nor claims to hold adversely.

"Fourth—That said lots lie within the corporate limits of the city of Florence, and, as designated on the recorded plat thereof, are entirely surrounded by streets dedicated to the public, and that the fence comprising the general inclosure, as above stated, is not on the line of said lots, nowhere touches any of them, and that none of said lots are inclosed or surrounded by a fence.

"Sixth—That neither said defendant nor any one else has been in the actual possession of said premises at any time during the period mentioned in said answer. The testimony shows that the defendant lived in the city of Florence and at his home just outside of Florence, which

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is known as the Parker homestead, and of which this property forms a part, continuously from the year 1856 down to 1878; that since the latter date he has resided at Davenport, Iowa, but has made very frequent visits to his old homestead near Florence, at intervals of from two to four months, remaining there each visit from a few days to as long as one month; that one or more of his family has, all the time since defendant's removal to Davenport, been on the Florence homestead with authority to represent defendant there as agent in all matters pertaining to his property interests, and has been in the actual occupancy of 'outlots 226 and 227.'"

The testimony shows that in the year 1865 defendant received and placed upon record a tax deed to said "outlots" 226 and 227, and paid the unpaid taxes against them, which extended back to the year 1859, and has ever since paid the taxes thereon; that in the spring of 1866 he sowed these lots with blue grass seed and subsequently used the same as a pasture, for which they are best adapted and most profitable. At first his stock was herded upon these lots every year, excluding the claims of all others, and later the lots were inclosed by a substantial fence in 1873 and 1874, and they have been kept fenced and been used as a pasture all the time to the commencement of plaintiff's action.

In *Blodgett v. Ulley*, 4 Neb., 25, the case of *Sage v. Hawley*, 16 Conn., 106, was cited with approval so far as it relates to a suspension of the running of the statute, and it was held, in effect, that if the right to bring an action during the defendant's absence was not suspended that the statute was not available as a defense. That case has not, so far as we are aware, been questioned. The question was carefully considered and we believe the decision is right, and it will be adhered to.

Now, aside from section 17 of the Code, was the right of action suspended during the defendant's absence? We

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think not. While the possession to be adverse must be actual as contrasted with constructive possession, yet such possession may be by an agent or tenant. (1 Am. & Eng. Ency. of Law, 254, and cases cited.) Actual possession is simply having the property in the immediate control or power of the party; when applied to land it means an actual entry and occupation thereof. This occupation may be disclosed by the appropriate use of the property according to its quality and condition, and may be by fencing and pasturing the land, by cultivation and payment of taxes, claiming to be the owner thereof. This occupation, if begun by a person by actual entry, may be continued by him by his agents or servants, because he is thus retaining the possession through them. (1 Am. & Eng. Ency. of Law, 184g, 184h, and cases cited.) The absence of the defendant from the state did not suspend the right of the plaintiff to bring an action to recover the possession of the land in question. The land was in Douglas county, and in the possession of the defendant, through his agent, and the plaintiff could have proceeded against him and his agents to recover the possession. (*Gartrell v. Stafford*, 12 Neb., 545.) Having failed to do so, the action is barred. The judgment of the court below is right, and is

AFFIRMED.

THE other judges concur.

F. M. RUBLEE V. HENRY S. DAVIS ET AL.

33	779
57	406

[FILED JANUARY 20, 1892.]

Negotiable Instruments: FAILURE OF CONSIDERATION: BONA FIDE HOLDER. The consideration for which a negotiable promissory note was given was a jack warranted by the seller to be a sure foal-getter. In an action upon the note by an indorsee,

Ruble v. Davis.

who purchased the paper before due, in the ordinary course of business, for value, having knowledge of the contract of warranty, but neither he nor the makers of the note had any knowledge that the warranty had failed until long after the transfer of the paper, *held*, that the defense of breach of warranty was not available against the plaintiff.

ERROR to the district court for Valley county. Tried below before TIFFANY, J.

E. J. Clements, and *C. A. Munn*, for plaintiff in error, cited: 1 Daniels Neg. Inst. secs. 165, 198, 777, 797, 800, 808; *Kelley v. Whitney*, 45 Wis., 110; *Mann v. Bank*, 10 Pac. Rep. [Kan.], 151; *Dobbins v. Oberman*, 17 Neb., 163; *Dinsmore v. Stimbert*, 12 Id., 439; *Homan v. Laboo*, 2 Id., 297; *Bank v. Ryman*, 12 Id., 541; *Fisk v. Benson*, 12 Pac. Rep. [Cal.], 454; *Newton Wagon Co. v. Diers*, 10 Neb., 287; *Borden v. Clark*, 26 Mich., 410; *Sackett v. Kellar*, 22 O. St., 554; *Loomis v. Mowry*, 8 Hun [N. Y.], 312; *Taylor v. Curry*, 109 Mass., 36; *Miller v. Ottaway*, 45 N. W. Rep. [Mich.], 665.

E. J. Babcock, and *H. E. Babcock*, *contra*, cited: 1 Am. & Eng. Ency. Law, 320, 321; 8 Id., 642, 643; 3 Wait, A. & D., 436; *Phillips v. Jones*, 12 Neb., 213, 215; *McKeighan v. Hopkins*, 19 Id., 40; *Wortendyke v. Meehan*, 9 Id., 221; *Olmstead v. Mtg. Sec. Co.*, 11 Id., 487; *Darst v. Backus*, 18 Id., 231, 233; *Merchants Ex. Bank v. Luckow*, 35 N. W. Rep. [Minn.], 434; *Mace v. Kennedy*, 36 N. W. Rep. [Mich.], 187; *Fifth Natl. Bank v. Edholm*, 25 Neb., 741; *Burroughs v. P'loof*, 41 N. W. Rep. [Mich.], 704; *Blackwell v. Wright*, 27 Neb., 269; *Haggland v. Stewart*, 29 Id., 69; *Conly v. Winsor*, 2 N. W. Rep. [Mich.], 31; *Paton v. Coit*, 5 Mich., 510; *Carrier v. Cameron*, 31 Id., 373; *Darrow v. Blake*, 13 N. W. Rep. [Ia.], 50; *Donovan v. Fowler*, 17 Neb., 247; *Fuller v. Hutchins*, 10 Cal., 523; *Armstrong v. Freeman*, 9 Neb., 11; *Graham v. Kibble*, Id., 182; *Young v. Pritchett*, 10 Id., 352; *Helling v. Mortg.*

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Sec. Co., Id., 611; *Sutton v. Beckwith*, 36 N. W. Rep. [Mich.], 79; *Dobbins v. Oberman*, 17 Neb., 163; *Savage v. Hazard*, 11 Id., 327; *Whitehorn v. Cranz*, 20 Neb., 392; *Hoffman v. Leibzarth*, 2 N. W. Rep. [Ia.], 518; *Cook v. Weirman*, Id., 386; *Ward v. Doane*, 43 Id. [Mich.], 980; *Goodrich v. McDonald*, 43 Id. [Mich.], 1019; *Norman v. Waite*, 30 Neb., 302; *First Natl. Bank v. Erickson*, 20 Id., 580.

NORVAL, J.

This suit was brought in the county court of Valley county, by the plaintiff in error, to recover the amount of two promissory notes, dated May 4, 1885, due thirteen months after date, one for \$200 and the other for \$150 payable to J. F. Coleman or order, and executed by the defendants. The petition is in the usual form when an action is brought by an indorsee of a promissory note against a maker.

The answer sets up that the notes were given as part consideration for a jack purchased by the makers of the payee, that the animal was warranted to be a sure foal-getter; and the defendants aver that the warranty has failed, and that the plaintiff purchased the notes with notice of and subject to the equities of the makers. The reply denies every allegation of the answer.

The cause was tried in the county court without a jury, and a judgment was rendered in favor of the defendants.

At the request of the plaintiff the county court made special findings of facts, which are set out in full in the transcript. The plaintiff prosecuted a petition in error to the district court, where the judgment of the county court was affirmed, and the plaintiff brings the cause here for review on error.

The sole question to be decided is this: Is the judgment of the county court sustained by the findings of fact? The facts found by the county court are as follows:

1. That the notes set forth in plaintiff's petition were

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given by the defendants H. S. Davis and A. Francis Davis at the time and in the manner set forth in said petition, and were secured by a chattel mortgage on a jack.

2. That said notes were given for the purchase price of a certain jack, and a part consideration for the giving of said notes was the warranting of said jack to be a sure foal-getter by said Coleman.

3. That a bill of sale of said jack, containing a warranty that he was a sure foal-getter was given by said J. F. Coleman to Henry S. Davis and A. Francis Davis, which bill of sale was recorded in the county clerk's office of Valley county on the 5th day of May, 1885.

4. That said notes were purchased of said J. F. Coleman by plaintiff, without fraud on his part, on or about the first day of June, 1885, in the ordinary course of his business, and the plaintiff paid therefor the sum of \$200, being the reasonable and fair value of said notes at that time, and that said notes were indorsed by said Coleman.

5. That before plaintiff purchased said notes, he knew that they were given in payment of the purchase of a certain jack, and was told by witness Johnson that the value of said jack depended wholly on his being a sure foal-getter, in answer to an inquiry of plaintiff as to the security on said notes.

6. That before plaintiff purchased said notes he was told by the defendant H. S. Davis that he would give no further security on said notes unless he knew whether the jack was as represented and guaranteed by Coleman.

7. That the plaintiff had no actual notice of the bill of sale and the warranty therein contained, which were recorded as aforesaid, and no actual knowledge of any of the facts save in the conversation had with the witness Johnson and defendant H. S. Davis.

8. That said jack was brought into Valley county from Missouri a short time before Coleman sold him to the Davises, and that neither H. S. Davis, A. Francis Davis,

nor the plaintiff knew at the time plaintiff purchased said notes that there was a failure of consideration or a breach of said warranty, and that neither of said parties knew, nor had any means of knowing, of said breach of warranty or failure of consideration until late in the fall of 1885.

Is the defense of breach of warranty available against the plaintiff? A holder of negotiable paper, who purchases it before maturity for a valuable consideration, in the usual course of business, without knowledge of facts which impeach its validity as between antecedent parties, is regarded a *bona fide* holder and takes the paper free from defense on the part of the maker. This court said in *Dobbins v. Oberman*, 17 Neb., 163, that "to defeat a recovery thereon, it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part."

Testing the facts in the case before us by this rule, are they sufficient to defeat the action? It appears from the finding of facts that the plaintiff purchased the notes in suit, of the payee in good faith, in the ordinary course of his business, before due, and paid for them their reasonable and fair value. True, he was aware, when he took the notes, that they were originally given in payment of a jack sold by the payee to the makers and that the animal was warranted by the seller, but he had no knowledge that there was a breach of warranty, nor were the facts or circumstances brought to his knowledge sufficient to charge him with notice thereof. At the time the notes were indorsed to the plaintiff, it was not known to the makers that there would be a breach of warranty, so had inquiry been made of the defendants, at or prior to the purchase of the paper, the plaintiff would not have ascertained that any defenses existed against the same. Although the plaintiff knew when he bought the notes for what they were given

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and that the jack was warranted, that fact alone is not sufficient to prevent the plaintiff from being a *bona fide* holder. To have that effect, he must also have known when he bought the notes that the warranty had failed, or possessed knowledge of facts sufficient to put him upon inquiry, which, if followed, would have led to its discovery. This the record fails to disclose. It only inferentially appears that there has been a breach of the warranty, and there is no finding of fact as to the actual value of the jack. Unless he was entirely worthless and possessed no value, there could not have been an entire failure of the consideration given for the notes. While it is doubtless true that the value of a jack depends largely upon his capability to produce foals, yet we cannot take judicial notice that where a jack is not a sure foal-getter he has no marketable value.

The case of *Miller v. Ottaway et al.*, 81 Mich., 196, cited by plaintiff in error, is quite in point. That was a suit upon a negotiable promissory note, given for a span of mares and two colts. The mares were warranted by the seller to be with foal. The plaintiff purchased the note before maturity, paying full value therefor, and while he knew at the time of the warranty, he had no knowledge of its breach. The defendant did not know that the mares were not with foal until some time after the transfer of the note. The court, after quoting from Parsons on Bills and Notes, and citing numerous authorities, in the opinion say: From the foregoing authorities, and upon reason, the correct doctrine appears to be that it is not a good ground of defense against a *bona fide* holder for value, that he was informed that the note was made in consideration of an executory contract, unless he was also informed of its breach. If he had knowledge of the breach, the defense may be interposed. * * * The note in question being valid in its inception, and not subject to any condition, a collateral agreement to warrant the mares to be with foal cannot be set up as a defense to the action in this case, where the

plaintiff purchased in good faith for value, and without notice or knowledge of any breach of the warranty. A mere collateral warranty or agreement, made at the time the note was given, does not affect the validity or negotiability of the note, although the purchaser before maturity may know of such agreement."

None of the cases cited upon the brief of defendant in error are applicable to the state of facts existing in this case. There is nothing to show bad faith, or want of honesty of purpose on the part of the plaintiff in the purchase of the note. He is an innocent purchaser, and the breach of warranty is no defense to the action. The judgments of the district and county courts are reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

HENRY H. SHUFELDT & Co. v. DAVID L. BARLASS.

[FILED JANUARY 20, 1892.]

33	785
152	505
23	785
58	19

1. **Sheriffs: RETURN: AMENDMENT.** The district court has power to permit a sheriff to amend his return on a process to conform to the facts, upon proper showing, and notice to the parties interested, and the permitting of such an amendment will not be disturbed by the supreme court, when it appears there has been no abuse of discretion.
2. —: **AMERCEMENT.** In proceedings to amerce a sheriff for failure to sell under an order of sale, certain attached personalty, it was established that a valid chattel mortgage existed thereon at the time of the levy of the attachment, for the full value of the goods. Subsequently the mortgagee brought an action of conversion against the officer, in which a judgment was recovered for the value of the property, which judgment was satisfied by

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the officer returning the goods, and paying to the mortgagee a large sum of money. The attaching creditor failed to give the sheriff an indemnifying bond. The district court held that the sheriff was not liable to amercement. *Held*, Proper.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Bowen & Hoepfner, for plaintiffs in error.

Capps, McCreary & Stevens, and *J. M. Ragan*, contra.

NORVAL, J.

The plaintiff in error presented to the district court of Adams county a motion to amerce the defendant in error, sheriff of said county, for failing to execute and return an order of sale of attached property issued out of said court, and directed to and placed in the hands of the defendant.

To the motion the sheriff filed an answer setting up facts in justification of his acts, and that the plaintiff had not been prejudiced or damaged thereby.

A reply was filed denying all the allegations of the answer. Upon the hearing the court held that the defendant was not liable to amercement, and overruled said motion. The plaintiff prosecutes error.

On the 21st day of February, 1888, the plaintiff in error commenced an action in the district court of Adams county against one Emanuel Fist, on an accepted draft, to recover the sum of \$347.57, and an order of attachment was issued, directed to, and placed in the hands of the defendant, as sheriff, for execution. Subsequently the officer made return of the writ, that he had levied the same upon fifty-nine cases of assorted liquors, nine casks of assorted liquors, twenty-three barrels of liquors, eleven skeleton cases, seven boxes of flasks, and thirteen sacks of corks.

On June 11, 1888, the plaintiff recovered a judgment against Fist for the sum of \$348.70 debt and costs of suit,

and obtained an order for the sale of the attached property.

On January 18, 1889, an order of sale was issued on said judgment and delivered to the sheriff, which not being returned, on May 20, 1880, amercement proceedings were commenced. On the same day the sheriff returned the order of sale, stating in the return that he had made no sale, for the reason that no property was taken by him under the order of attachment, and that the return on the writ of attachment to the effect that property had been taken was a mistake. On the same day the sheriff, after first obtaining leave of the court therefor, filed an amended return to the original order of attachment which states that no property was levied upon, and that the original return was erroneously made.

The first error assigned is in permitting the officer to amend his return to the order of attachment. The undisputed testimony shows that at the time the order of attachment was received by the sheriff, the property of *Fist* was held by the officer under certain writs of attachment sued out by other creditors of *Fist*, and that the property was also claimed by the *A. Furst Distilling Company*, by virtue of two chattel mortgages executed by said *Fist*.

There is testimony tending to show that immediately upon the delivery of the order of attachment in question to the sheriff, he demanded an indemnifying bond of one of the attorneys of said *Shufeldt & Co.* before he would make the levy under said writ, and that such bond was never given, nor was any levy ever made. The sheriff had a perfect right to refuse to execute the writ until he was indemnified against any loss he might sustain by reason of the seizure of the property, and if, on account of the failure of the plaintiff to furnish an indemnifying bond after being requested so to do, the officer in fact did not execute the order of attachment, he ought in justice to be permitted to amend his original return to conform to the facts. The

power of the district court to permit an officer to amend his return according to the facts cannot be doubted, and where such an amendment has been made upon proper showing and notice to the parties interested, the ruling will not be molested unless it appears that there has been an abuse of discretion. The only conflict in the testimony is upon the question whether the sheriff ever made a demand for indemnity. He testifies positively that he did, and that there never was any demand for indemnity made as emphatically testified to by the attorney for the plaintiff. The court below thought the showing of the officer for permission to amend his return was sufficient, and its finding not being unsupported by the evidence, will not be disturbed. The fact that the application for leave to make the amendment was not made until the expiration of several months after the writ was returned did not bar the right of the officer to make the amendment. In *O'Brien v. Gaslin*, 20 Neb., 347, the sheriff was permitted to amend his return of the sale of real estate upon execution to conform to the facts after the lapse of eight years, and it was held that the granting of amendment was not an abuse of discretion, but was the proper exercise of the power of the court.

Conceding that the defendant in error did levy the writ of attachment issued in favor of Shufeldt & Co. upon property as stated in the original return thereon, it does not necessarily follow that the sheriff should be amerced for refusal to sell under the order of sale the property thus attached. The undisputed testimony shows that prior to the issuing of the attachment the property levied upon was mortgaged by Fist to the A. Furst Distilling Company; that subsequently the mortgagees commenced an action of replevin against the sheriff to recover the possession of the goods, and failing to give the bond required by the statute, of the plaintiff in replevin, the action proceeded against the officer as one for damages, which re-

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sulted in a judgment in favor of the plaintiffs therein for the sum of \$2,000, that being the value of the goods, which judgment has been settled by the sheriff by returning the property and paying \$1,000 in money. Under these circumstances we think amercement was properly refused. First, the judgment debtor of Shufeldt & Co., had no interest in the property liable to their attachment, as his interest had been conveyed by the mortgages given to the distilling company. The plaintiffs did not sustain any loss or damage by reason of the acts of the sheriff. Had the plaintiffs in the replevin suit given bond and had judgment been rendered therein in their favor, it could not be successfully claimed that such proceedings were not a sufficient excuse for the refusal of the officer to sell the property thus taken from him by legal process. In principle we can discover no difference between a case where the property levied upon by a sheriff is taken from him on replevin and one where judgment for the value of the property is recovered against the officer in an action against him for conversion by the real owner. It was competent for the sheriff to show that the goods were not liable to the writ, but in fact belonged to the distilling company by virtue of their chattel mortgages. (*Freiberg v. Johnston*, 9 S. W. Rep. [Tex.], 455.)

In proceedings to amerce a sheriff for failure to execute and return an execution or writ of attachment the measure of damages is limited to the actual loss sustained by the plaintiff in the value or availability of his security by reason of the acts of the officer. (*Crooker v. Melick*, 18 Neb., 227; *Hellman v. Spielman*, 19 Id., 152.) Applying this rule to the facts in the case before us, it is obvious that the plaintiffs in error have not been prejudiced by the refusal of the sheriff to sell the property. The judgment is

AFFIRMED.

THE other judges concur.

CHAS. H. WILDE V. FREDERICKA PREUSS.

[FILED JANUARY 20, 1892.]

Justice of the Peace: APPEAL: TRANSCRIPT FILED BY APPELLEE AFTER TIME. Where a party to a judgment rendered by a justice of the peace files an undertaking for an appeal within ten days after the date of the judgment, but fails to file a transcript of the proceedings in the district court within thirty days next following the rendition of the judgment, the appellee may file such transcript and have the cause docketed; and the district court is authorized, on his motion, either to dismiss the appeal, or enter a judgment in his favor similar to that rendered by the justice.

ERROR to the district court for Cuming county. Tried below before POWERS, J.

T. M. Franse, for plaintiff in error.

J. F. Losch, *contra*, cited: *Strine v. Kaufman*, 12 Neb., 423; *Raymond v. Strine*, 14 Id., 236; *Cleghorn v. Waterman*, 16 Id., 227; *Lincoln Brick & Tile Works v. Hall*, 27 Id., 877; *Muldoon v. Levi*, 25 Id., 457.

NORVAL, J.

This suit was brought by the defendant in error against Charles H. Wilde before a justice of the peace of Cuming county to recover the amount of a promissory note. After the action was commenced the trial was postponed by the justice several times at the request of both parties; the last adjournment being to May 14, 1889. The defendant's attorney, Mr. Franse, filed an affidavit denying the execution and delivery of the note.

On the 14th day of May, 1889, a judgment was rendered in favor of the plaintiff in the action for \$85.45. Four days later the defendant filed a motion to set the judgment

aside on the ground that it was rendered in his absence, which being overruled, the defendant filed an undertaking with the justice on May 21, 1889, for an appeal to the district court, which bond was duly approved. The appellant failed to file a transcript of the proceedings in the district court within thirty days next following the rendition of the judgment, as provided by section 1008 of the Code of Civil Procedure. Subsequently, on the 19th day of September, 1890, the defendant in error filed a transcript of the proceedings of the justice in the district court and caused the case to be docketed, and on his motion the district court, over the objection and exception of the plaintiff in error, entered a judgment in favor of the defendant in error similar to that rendered by the justice court.

Section 1011 of the Code points out the method of procedure when the appellant fails to file a transcript in the district court, and perfect his appeal within the time provided by statute. The section reads: "If the appellant shall fail to deliver the transcript and other papers, if any, to the clerk, and have his appeal docketed as aforesaid within thirty days next following the rendition of said judgment, the appellee may, at the first term of the district court after the expiration of thirty days, file a transcript of the proceedings of such justice, and the said cause shall, on motion of said appellee, be docketed; and the court is authorized and required, on his application, either to enter up a judgment in his favor similar to that entered by the justice of the peace, and for all the costs that have accrued in the court, and award execution thereon, or such court may, with the consent of such appellee, dismiss the appeal at the cost of the appellant, and remand the cause to the justice of the peace, to be thereafter proceeded in as if no appeal had been taken," etc.

The defendant in error, on the failure of the appellant to file a transcript of the judgment in the district court within thirty days after the rendition of the judgment, had

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the choice of either of two remedies. He was authorized to file such transcript, have the cause docketed, and the appeal dismissed, or on the filing of such transcript to have a judgment entered in his favor similar to that entered by the justice. The procedure followed in the case at bar is within the letter of the above section of the statute, and in line with the numerous decisions of this court. (See *Clapp v. Bowman*, 22 Neb., 198; *Wilson v. Wilson*, 23 Id., 455; *Slaven v. Hellman*, 24 Id., 646; *Converse Cattle Co. v. Campbell*, 25 Id., 37; *Muldoon v. Levi*, Id., 457.)

The fact that the appellant, nearly three months after the rendition of the judgment by the justice, filed in the district court a transcript of the proceedings and a petition in error, did not take away from the district court the jurisdiction or power to enter the judgment it did. Such power is conferred by statute in all cases where the appellant fails to perfect his appeal in time. This is perfectly clear, and argument could not make it plainer.

Whether the justice erred in overruling the motion of the defendant to set aside the judgment we are not now called upon to decide, as no such question was presented in the appeal case to the court below. It is the decision of the district court alone that is before us for review, and there being no error in its rulings, the judgment is

AFFIRMED.

THE other judges concur.

E. A. FLETCHER V. R. F. CUMMINGS.

[FILED JANUARY 20, 1892.]

1. **Attorney and Client: COLLECTIONS: THE PETITION** construed, and held to state a cause of action against an attorney for money collected by him in the course of his employment and in his hands belonging to his client.
2. ———: ———: **AN AVERMENT** in a petition that the defendant neglected and refused to pay a certain sum of money, though requested so to do, is a sufficient allegation of a demand being made.

ERROR to the district court for Franklin county. Tried below before GASLIN, J.

E. A. Fletcher, pro se, cited: *Loveless v. Fowler*, 79 Ga., 134; Bouvier, Law Dic. [15th Ed.], 399, and cases; *Lorillard v. Barnard*, 42 Hun [N. Y.], 545; *Boyer v. Clarke*, 3 Neb., 161.

A. F. Moore, contra, cited: *Dillon v. Scofield*, 11 Neb., 422; *Null v. Jones*, 5 Id., 500; *Sanborn v. Follett*, 12 Id., 320; 1 Am. & Eng. Ency. of Law, 958; Weeks, Attorneys, 263; *Voss v. Bachop*, 5 Kan., 67; *Ex parte Ferguson*, 6 Cow. [N. Y.], 596; *Stafford v. Richardson*, 15 Wend. [N. Y.], 303.

NORVAL, J.

This action was brought by the defendant in error, in the county court of Franklin county, to recover the sum of \$145, with interest thereon, being money of the plaintiff collected by the defendant as an attorney at law. The defendant filed a set-off for \$31.32. Upon the trial the county court rendered judgment in favor of the plaintiff for \$127.68, and costs. The defendant appealed the cause to the district court, where the defendant filed a general

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demurrer to the petition, which was overruled, and the defendant electing to stand upon his demurrer, judgment was entered for the plaintiff in the sum of \$5.85.

The sole question presented for the consideration of this court is, whether the district court erred in overruling the demurrer to the petition.

The petition is as follows:

"The plaintiff says this case came into this court on appeal from a judgment of the county court of this county; that on the 27th day of December, 1887, the defendant had in his possession money collected by him as an attorney for this plaintiff, the property of the plaintiff, in the sum of \$145. The defendant was entitled to retain of the amount the sum of \$16.50 for services rendered for this plaintiff, and no more, and plaintiff was entitled to the immediate payment of the remaining sum of \$128.50. On said 27th day of December, 1887, the defendant converted said sum of \$128.50 to his own use, and neglected and refused to pay the same to the plaintiff, though requested so to do. Since the judgment in this case was rendered in county court, the defendant has paid thereon the sum of \$123 and no more. There is now due from the defendant to the plaintiff of said money so wrongfully converted by the defendant to his own use the sum of \$5.50, with interest thereon from December 27, 1887.

"Wherefore plaintiff prays judgment against the defendant for said sum of \$5.50, with interest as aforesaid, and his costs."

We have no doubt the pleading states a cause of action, and the demurrer thereto was properly overruled. The petition clearly shows that Fletcher, as the attorney for the plaintiff, collected for Cummings \$145; that plaintiff in error was entitled to retain therefrom as compensation for services rendered for Cummings the sum of \$16.50 and no more; that the plaintiff in error converted to his own use,

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of the money so collected, the sum of \$128.50, but has since the rendition of the judgment in the county court paid the plaintiff below \$123, and no more, and that there is due from Fletcher \$5.50.

The allegation is that "the defendant converted said sum of \$128.50 to his own use, and neglected and refused to pay the same to the plaintiff, though requested so to do." This was a sufficient allegation of demand for the money on the part of the plaintiff and refusal to pay by the defendant.

It is suggested by plaintiff in error that he tendered, in the county court, to the plaintiff below, \$123, and after judgment the plaintiff accepted the tender so made, and for that reason the debt is discharged. There is nothing in the record before us to show that any tender was made. It does appear that Mr. Fletcher offered in writing to allow judgment to go against him for \$123 and costs, and that some time after judgment was entered in the county court plaintiff's attorney received of Mr. Fletcher "\$123, to apply as *part* payment upon judgment of *Cummings v. Fletcher*." The receipt of this money did not discharge the debt. It was accepted only as part payment. If the defendant desired a larger sum as compensation for his services as attorney for the plaintiff, he should have presented such defense in an answer, as he did in the county court, instead of demurring to the petition. No defects appear upon the face of the petition and the demurrer was properly overruled. The judgment is

AFFIRMED.

THE other judges concur.

T. J. COURTNEY ET AL. V. A. J. NEIMEYER & CO.

[FILED JANUARY 27, 1892.]

1. **Executions: PARTNERSHIP PROPERTY: RELATIVE RIGHTS OF CREDITORS.** N. & Co. recovered a judgment against C. & G. upon a joint promissory note, and caused an execution to be issued thereon, which was levied by the sheriff on partnership property belonging to C. & G. Soon afterwards, and before a sale under the execution, C. & G., as a firm, confessed judgment in favor of McP., who thereupon caused an execution to be issued thereon, which was levied by a constable upon the same property as that previously levied upon by the sheriff. In an action in equity by N. & Co., in which they alleged that the debt on which their judgment was based was a firm debt of C. & G., the answer raised the same question, and upon the issues thus formed the court found in favor of N. & Co. *Held*, That the judgment was supported by the clear weight of evidence.
2. **Jurisdiction: OBJECTIONS TO MUST BE RAISED SPECIALLY.** Where the court has jurisdiction of the subject-matter and the parties, and the issues are tried without objection, the court will not on its own motion raise objections to its jurisdiction.

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

R. St. Clair, for plaintiff in error, cited: *Parsons*, Partnership, 215, 490, 501; *McNaughton v. Partridge*, 11 O., 235; High, Injunctions, secs. 98, 100; *Freeman*, Judgments, secs. 216, 217; *Abbott*, Trial Ev., ch. 62, 833; *Embury v. Conner*, 3 N. Y., 511; *Pray v. Negeman*, 98 Id., 358; *Jackson v. Astor*, 1 Wis., 137; *Woodward v. Hill*, 6 Id., 143; *Jacobs v. Miller*, 15 N. W. Rep. [Mich.], 42.

A. H. Burnett, *contra*, cited: *Carlow v. Aullman*, 28 Neb., 672; *Carson v. Byer*, 67 Ia., 606; *Berkshire v. Juilard*, 75 N. Y., 535; *Martin v. Davis*, 21 Ia., 535; *Stevens v. Bank*, 31 Barb. [N. Y.], 290; *Trobridge v. Cushman*,

Courtney v. Neimeyer.

24 Pick. [Mass.], 310; *Blankenship v. Wartelsky*, 6 S. W. Rep. [Tex.], 140; *Ex parte Bank*, 70 Me., 378; *Walker v. Chase*, 53 Id., 258; Bates, Partnership, sec. 1130; Freeman, Executions, sec. 436.

MAXWELL, CH. J.

This action was brought in the district court of Kearney county by the defendants in error against the plaintiffs in error, the cause of action being set forth in the petition as follows:

"Plaintiffs for cause of action say that they are a firm doing business at Minden, Neb., under the firm name of A. J. Neimeyer & Co.; that the said T. J. Courtney is a constable in said county; that the defendants H. T. Campbell and H. E. Gibboney are partners formed and doing business at Minden, Neb., under the firm name and style of Campbell & Gibboney, and have been such partners doing business as aforesaid for the last past four years and more.

"Second—That on the 17th day of December, A. D. 1888, in the district court of Kearney county, Nebraska, the plaintiffs recovered a judgment against said H. T. Campbell and H. E. Gibboney for the sum of \$233 and costs taxed at \$——; that said judgment was recovered for an amount due plaintiffs on a promissory note signed by said H. T. Campbell and H. E. Gibboney, payable to the order of plaintiffs; that said note was given in settlement of a partnership debt contracted by said firm in the general and usual scope of their firm business, and said judgment is for a partnership debt, as the pleadings of said Campbell & Gibboney in such action will fully show.

"Third—The said defendants, the firm of Campbell & Gibboney, are the owners, and for the last past three years have been the owners, of a certain one-story, shingle roof, frame building used as a carpenter shop, situated on the east end of lot 9 in block 28, city of Minden, Kearney county,

Nebraska, but are not owners of the land upon which the same is situated, neither have they any legal or equitable interest therein; and said building is free and clear from all liens or incumbrances except as hereinafter shown, and of the value of \$80.

"Fourth—No supersedeas bond has been filed in said action, neither has execution on said judgment been stayed as provided by law, and more than twenty days have elapsed since the recovery of the same and since the rising of the court for that term, and said judgment is now in full force and no part thereof has been paid. Plaintiffs further represent that on the 3d day of January, 1889, they caused the clerk of said court to issue an execution on said judgment against the goods and chattels of said defendants, and for want of goods and chattels against the lands and tenements of defendants. On said day execution was duly and legally issued by said clerk, under his seal of office and in due form, and placed in the hands of the sheriff of Kearney county. On the same day the sheriff, under and by virtue of such writ, levied upon said building in due form and advertised the same for sale on February 16, 1889. At the time he made such levy he made note of the same on the back of the writ. Such writ of execution is still in the hands of the sheriff, pending sale of said property thereunder.

"Fifth—Plaintiffs further represent to the court that on the 12th day of January, A. D. 1889, John L. McPheely, one of the defendants herein, recovered, or pretended to recover, a judgment against the defendants Campbell & Gibboney for the sum of \$75, in the county court of Kearney county, Nebraska. * * *

"Sixth—On the same day an execution was issued on such judgment by said court and delivered to the defendant T. J. Courtney, constable, who, on the same day, with full knowledge of the prior levy made by the sheriff, under and by virtue of the execution issued upon plaintiffs' judg-

ment as aforesaid, levied upon the said building, and advertised the same for sale thereunder on January 22, 1889.

"Seventh—Plaintiffs allege that all of said defendants herein had full knowledge of the levy under plaintiffs' execution.

"Eighth—Plaintiffs allege that said Campbell & Gibboney and neither of them, have any other property or effects of any kind subject by the law to execution.

"Ninth—Plaintiffs allege that the judgment obtained by said John L. McPheely is absolutely void and of no effect, and that the levy made by said Courtney is void and of no effect, but if good, subject to the levy made by the sheriff as aforesaid.

"Tenth—Plaintiffs allege that the defendants are about to sell said building under their said execution, and have so advertised it for sale thereunder on the 22d day of January, 1889."

The plaintiffs in error (defendants below) filed an answer, which contains a number of specific denials of the allegations of the petition, and alleges that the claim of the defendants in error was not a partnership debt of H. T. Campbell and H. E. Gibboney, but their individual obligation, while that of the plaintiff in error McPheely was a partnership debt. Upon the issues thus formed the cause was tried.

The question of the jurisdiction of a court of equity upon the facts stated is not raised by either party. Both parties sought affirmative relief. The court had jurisdiction of the subject-matter and the parties, and there being no objection to the procedure, the power to render a judgment in the premises is undoubted, and in such case the court itself will not raise the question of the jurisdiction of the court.

On the trial of the cause the court below found the issues in favor of the defendants in error and rendered a decree accordingly.

Omaha Real Estate & Trust Co. v. Murphy.

The issue made by the pleadings was, whether or not the debt of Campbell & Gibboney to the defendants in error was a partnership debt of said parties. If so, then the judgment of the court below is right. The proof upon this point seems to establish the truth of the facts stated in the petition, that the debt upon which the judgment was recovered in favor of the defendants in error was that of the firm of Campbell & Gibboney. The judgment therefore conforms to the proof and is

AFFIRMED.

THE other judges concur.

OMAHA REAL ESTATE & TRUST CO., APPELLANTS, v.
JOHN A. MURPHY ET AL., APPELLEES.

[FILED JANUARY 27, 1892.]

Review: REAL ESTATE: FALSE REPRESENTATIONS. In an action by a vendor of real estate to enforce the contract for the sale of certain lots, the defendants answered in substance that the agent of the plaintiff, in selling the same, represented that they were high and dry and level, and that they had no knowledge as to the location of the lots, and relied on said representations, and the lots were not high and dry and level, but on the contrary were situated in a low place. *Held*, That as the testimony was conflicting, and it did not appear that the judgment was clearly wrong, it would not be set aside.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

George W. Covell, for appellant.

John C. Shea, contra.

MAXWELL, CH. J.

This action is brought by the plaintiff, as vendor of certain lots in an addition to the city of Omaha, to compel the defendants to comply with their contract for the purchase of said lots, or in case they fail to do so that their rights therein may be foreclosed and said premises sold, etc. The defendants filed an answer, as follows: "That it is true that they purchased from the plaintiff on a contract five lots, but that said lots are not the lots shown to defendants by plaintiff.

"Second—That said plaintiff, through its authorized agent, sold to defendants five lots and represented to the defendants before the signing of said contract that said lots were high and level, and in the choicest part of the addition, which representation was false, and known to be false, by the plaintiff; that said defendants, relying on the representation made, did sign the contract as set out in plaintiff's petition; that said defendants subsequently investigated the location of the lots mentioned in said contract and found that the lots which the plaintiff agreed to sell to them were not the lots mentioned in said contract, and so acquainted the said plaintiffs of the same, and refused to pay any further sum or sums on said contract. Defendants, therefore, pray that they may be relieved from the terms of said contract; that the same be annulled and the amount paid by them on said contract be decreed in their favor, and for such other relief as to the court may seem just and equitable."

The reply is a general denial.

On the trial of the cause the court found the issues in favor of the defendants. The principal objection made in this court is, that the judgment is not supported by the evidence. The defendants testify in substance that they were unacquainted with the lots in question when they purchased the same, that the agent, to effect the sale for the

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plaintiff, represented that the lots were high and dry and level, and the defendants, relying upon said representations, purchased said lots, and they are not high and dry and level, but, on the contrary, are situated in a draw, or low place, and are not desirable. There is considerable conflict as to the location of the lots, although some of the testimony on that point is hearsay. The conflict in the testimony is so great that it is impossible for this court to determine that the witnesses of the plaintiff are entitled to more credit than those of the defendants. The district court had the witnesses before it and possessed advantages in that regard for forming an opinion as to their credibility that we do not have, and as the judgment is not clearly wrong it must be

AFFIRMED.

THE other judges concur.

C. H. TONCRAY ET AL. V. DODGE COUNTY ET AL.

[FILED JANUARY 27, 1892.]

1. **COUNTIES: THE RECORD BOOKS** of a county are purchased and paid for by the county and owned by it, although they may relate to private transactions between individuals.
2. **Clerk of District Court: NEGLIGENCE: LIABILITY OF SURETIES.** While the record of a district court is supposed to contain a history of the proceedings before that tribunal, and is under the control of the judge, so far that it shall be a truthful statement of the proceedings, yet the ownership of the books themselves is in the county; and for any dereliction of official duty in the clerk of the court, by reason of which the county sustains pecuniary loss, the officer and sureties will be liable on his bond.
3. ———: ———: **CASE STATED.** One S. was clerk of the district court of D. county, and left nine books of the records of the

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court in the court room nearly four weeks after the adjournment of court. The county had provided an adequate fire-proof vault for the preservation of such books. The books were injured or destroyed by fire, while remaining in the court room. The county thereupon expended \$,1321 in the purchase of new books and transcribing from those injured by fire. *Held*, That the county was entitled to recover the value of such books and labor and that the questions were fairly submitted to the jury.

ERROR to the district court for Dodge county. Tried below before MARSHALL, J.

E. F. Gray, for plaintiffs in error, cited, to the contention that the county had no legal capacity to maintain the action, or authority to incur the expense of rewriting: *Inhabitants v. Fiske*, 8 Cush. [Mass.], 264; *Rasmusson v. Co. Com'rs*, 43 N. W. Rep. [Minn.], 3; *Hallenbeck v. Hahn*, 2 Neb., 397; *Stewart v. Otoe Co., Id.*, 183; *McCann v. Otoe Co.*, 9 Id., 331; *State v. Lincoln Co.*, 18 Id., 283-4.

Geo. L. Loomis, contra, in reply: *Parish of Sudbury v. Stearns*, 21 Pick. [Mass.], 148; *Sawyer v. Baldwin*, 11 Id., 492. As to the sufficiency of the bond: *Kopplekom v. Huffman*, 12 Neb., 95; *Tevis v. Randall*, 6 Cal., 632; *Brock v. Hopkins*, 5 Neb., 231; *Ryan v. Bank*, 10 Id., 524; *Fox v. Thibault*, 33 La. Ann., 32; *Cedar Co. v. Jenal*, 14 Neb., 254; *U. S. v. Prescott*, 3 How. [U. S.], 578; *U. S. v. Dashiell*, 4 Wall. [U. S.], 182; *Boyden v. U. S.*, 13 Id., 17; *Redwood Co. v. Tower*, 28 Minn., 45; *Murfree*, Official Bonds, sec. 464; *Com. v. Comly*, 3 Pa. St., 372; *State v. Harper*, 6 O. St., 607; *Muzzy v. Shattuck*, 1 Denio [N. Y.], 233.

MAXWELL, CH. J.

This action was brought by the county of Dodge against the sureties of Louis Spear to recover the value of certain record books of the district court which it is claimed were destroyed by fire through his negligence. On the trial of

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the cause the jury returned a verdict in favor of the county for the sum of \$1,200, upon which judgment was rendered. It appears from the record that Spear was elected clerk of the district court of Dodge county at the general election in November, 1883; that he filed an official bond with the plaintiffs in error as sureties, and entered upon the duties of his office in January, 1884, and continued as clerk of said court until January, 1888; that during all that time until the court house burned December 31, 1887, Dodge county was possessed of a court house at Fremont, in which was an office for the use of the clerk of the district court; that adjoining this office and opening into the same was a fire-proof vault exclusively for the use of such clerk in which to keep his papers and records; that the district court had been in session on the 3d day of December, 1887, and adjourned, but the records destroyed were permitted to remain in the court room and outside of the vault up to the time of the fire by which they were injured or destroyed on the 31st of December, 1887. Four of these records, viz., the judgment index, general index, judgment docket, and execution docket, were entirely rewritten, and the other five partially copied or rewritten. The county paid \$121 for nine new books, and \$1,200 for the labor of transcribing said records. There is but little conflict in the testimony as to the actual facts in the case. The points relied upon by the plaintiff in error for a reversal of the case may be summarized as follows:

First—That the petition fails to state a cause of action against the sureties.

Second—That the bond sued on, being made to the people of Dodge county, of the state of Nebraska, is void.

Third—A failure to allege and prove any breach of condition of the bond.

Fourth—Admission of improper evidence.

Fifth—Error in giving and refusing instructions.

In the elaborate and carefully prepared brief of the at-

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torney of the plaintiffs in error it is argued with great earnestness that the county has no right to sue for the loss of the records; in other words, that the county has no ownership, title, or right to the records in question and that therefore it has suffered no wrong. The county provides the records and a place to keep them; in other words, the county, through its county board, purchases the books and provides a place of supposed safety to keep them in. For this purpose a court house is erected with fire-proof vaults and a large amount of money annually expended by the county in providing the necessary conveniences and protection of various records of the different departments of the county government, as the county clerk, county treasurer, county superintendent, county judge, clerk of the district court, etc. All these records, although to a great extent they relate to private transactions between individuals, yet are public records and open to public inspection. They are owned and kept by the county for the use of all who may have occasion to examine them. The county board thus has a general supervision over them, and being county property it is the duty of such board to care for and protect them. If this were not so, then any person who felt so disposed could take any record he chose out of any county office and carry it away and the county would be powerless to prevent the wrong; and if he would carry one he would have the same right to carry all of them away and the county be remediless. It is evident that no such right exists and that the county board may bring an action to protect the county records, and for their loss or destruction. Not only may it do this, but should any county official be guilty of any impeachable offense in connection with the duties of his office, such as the destruction or mutilation of records in his care, the county board, after a fair trial, might remove him and appoint another person in his place in order that the integrity of the records should be preserved. (*State v. Meeker*, 19 Neb., 444; *State v. Oleson*, 15

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Id., 247.) It thus becomes the duty of the board to see that the several officers perform their duties. The first objection therefore is untenable.

The second objection, that the bond was to the people of Dodge county, is answered by the case of *Huffman v. Koplekom*, 8 Neb., 346. In that case the bond was given to the state and it was held to be a mere irregularity, and the ruling in that case is applicable in this.

The third objection is that there was no breach of the condition of the bond.

Sec. 12, ch. 10, Comp. Stats., provides that "All official bonds shall be obligatory upon the principal and sureties, for the faithful discharge of all duties required by law of such principal, for the use of any persons injured by a breach of the condition of such bonds." Now, did Mr. Spear faithfully perform his duty in leaving the records out of the vault? This was, under the circumstances, a question of fact to be determined from the evidence. If he did faithfully perform his duty in that regard, then neither he nor the sureties on his bond would be liable. If, however, he did not, then any person injured by such neglect of official trust has a cause of action against him and his sureties. We know of no reason why the county should be excluded by construction from the benefits of the bond. The county is a corporate body—is a person in law, and if it has sustained damages by a neglect of, or violation of, official duty it has its remedy like any other person upon the bond for relief.

Some objection is made to the introduction of certain testimony, which need not be noticed here.

It is claimed that the court erred in giving and refusing certain instructions. The instructions are as follows:

"The jury are instructed that in this case the plaintiff in its petition alleges and claims as follows:

"1. That it is a corporation duly organized as a county.

"2. That the defendant Spear was, at the general elec-

tion in 1883, in said county, duly elected clerk of the district court of said county.

"3. That he, on November 28, 1888, as such clerk, gave his bond in the sum of \$5,000, with the other defendants as his sureties, conditioned that said Spear would well and faithfully perform the duties of his said office according to law and the best of his ability, and deliver to his successor at the expiration of his term all books, papers, and moneys that should come into his possession by virtue of said office, and that said bond was duly approved December 4, 1883, and that the said Spear on January 3, 1883, entered upon the duties of his said office.

"4. That said Spear, by virtue of said office, came into possession of all the books, records, and papers belonging to said office, among others the books and records thereafter alleged to have been burned and injured.

"5. That the plaintiff from January 3, 1884, to December 31, 1887, was the owner of a court house in Fremont, Nebraska, and therein the plaintiff provided for the clerk of the district court an office-room for his sole use, including a large and suitable fire-proof vault sufficient for the safe-keeping of the books, records, and papers of that office.

"6. That during the said term of office of said Spear he occupied said office-room and vault, and had the exclusive use and possession thereof for the safe-keeping of said books, records, and papers, and that it was his duty to keep the same therein.

"7. That said Spear, disregarding his duty to so keep said books, records, and papers, negligently and wrongfully permitted them in the day-time and night seasons to be and remain outside of said vault in his office and in the court room, lying about on chairs, tables, desks, etc., exposed to all the dangers of loss by fire.

"8. That on December 31, 1887, the said Spear, while said books and records were not in actual use, and while

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they were lying around in the court room outside of said vault, and where they were wrongfully and negligently permitted to remain by said Spear, and when the same should have been placed in said vault, a fire broke out in said court house and burned and destroyed one general index, one judgment index, one complete record book, one court journal, two appearance dockets, one judgment docket, one execution docket, one court docket, and two naturalization record books, the property of the plaintiffs, and all then in the possession and custody of said Spear by virtue of said office.

"9. That said described books and records were then burned, damaged, and destroyed by reason of the negligence of said Spear in leaving the same in said court room outside of said vault, and that had they been in said vault at the time of the fire they would not have been burned, damaged, or destroyed.

"10. That thereby the plaintiff has been damaged in the sum of \$1,200, for which sum it asks judgment. The defendants Toncray, Muller, Knoell, and Brunk in their answer admit the corporative character of the plaintiff; that said Spear was elected and acted as clerk of the district court; that he gave the said bond with the answering defendants as his sureties thereon; that said bond was approved; that said Spear was in the possession of the said records and books as such clerk, and that a fire broke out in said court house as stated in the said petition; and they deny each and every allegation in said petition not admitted by them in their answer. These pleadings, to-wit, the petition of the plaintiff and the answer of the defendants, present the issues to be tried by this jury.

"Second—The jury are instructed that the burden is upon the plaintiff, and it is for it to prove every material allegation of its petition by a preponderance of the evidence. If, upon any one or more of the material allegations of the plaintiff's petition, the evidence is evenly

balanced, or if it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury should find for the defendant. By a preponderance of the evidence is meant the weight of evidence—that which on the whole evidence, when fully, fairly, and impartially considered by the jury, produces the stronger impression upon the minds of the jury and is more convincing as to its truth when weighed against the evidence in opposition thereto.

“Third—The jury are instructed that the credibility of the witnesses is a question exclusively for the jury to determine. In determining the weight to be given to the testimony of the several witnesses the jury should take into consideration their interest in the result of the suit, if any such is proved, their conduct and demeanor while testifying, their apparent fairness or bias, if any such appears, their opportunities for seeing or knowing the things about which they testify; the reasonableness or unreasonableness of the story told by them, and all the evidence and facts and circumstances proved tending to corroborate or contradict such witness, if any such appear.

“Fourth—The jury are instructed that in determining any of the questions of fact presented in this case, the jury should be governed solely by the evidence introduced before them. The jury have no right to indulge in speculations, conjectures, or inferences not supported by the evidence. Each juror may apply to the subject before him that general knowledge which any man may be presumed to have, yet if he be personally acquainted with any material or particular fact or facts, he is not permitted to mention the circumstances privately to his fellow jurors. Therefore, if any juror knows any particular fact or facts material to the issues in this case it is his duty while sitting as a juror on the trial thereof to keep and remain silent in relation thereto.

“Fifth—The jury are instructed that if, from the evidence in this case, the jury believe that the books and

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records in question were those in the possession and custody of said Spear by virtue of his office as clerk of the district court of Dodge county, then the plaintiff is to be regarded as the owner thereof.

"Sixth—The jury are instructed that one of the principal questions for the jury to determine in this case is: Was the damage to, or destruction of, the books and records by said fire due or chargeable to the negligence of the said Spear in caring for them?

"Seventh—The jury are instructed that negligence in a general sense is every omission to perform a duty imposed by law for the protection of one's own property or that of another. Ordinary negligence is the want of such care and diligence as reasonably prudent men, generally, in regard to the subject-matter of inquiry under such circumstances as these under consideration, would use to prevent or avoid the injury complained of.

"Eighth—The jury are instructed that the said Spear, in the care and custody of the books and records in question, was required to use ordinary care in keeping them safe from damage or destruction. If a fire-proof vault was by the county provided for or furnished him, to safely keep said books and records in, and if it was reasonably suitable and convenient for him in the exercise of ordinary care, and in performing the duties of his office, to keep said books and records in said vault, then it was the duty of said Spear in the night season to keep said books and records in said vault, when not in use by him in his office; and if from the evidence in this case the jury believe that said Spear at the time in question failed to exercise such ordinary care for the safe keeping of said books and records, then he was guilty of negligence in relation to that matter; and if from the evidence in this case the jury believe that it was the duty of said Spear in the exercise of ordinary care to have placed said books and records in said vault at the time in question, and that he failed to do so, and that on account

of the failure of said Spear to place said books and records in said vault at the time in question the said books were damaged or destroyed by said fire, then the said Spear and also the other defendants would be liable for the damage to or destruction of said books or records on account of said fire.

"Ninth—The jury are instructed that if from the evidence in this case they believe under the instructions herein given that the books and records in question were damaged or destroyed by or through the negligence of the defendant Spear, then all the defendants would be equally liable with the said Spear, although they had nothing to do with the care or custody of said books or records.

"Tenth—The jury are instructed that if from the evidence in this case they find for the plaintiff, then the jury will from the evidence find, the amount of damages which the plaintiff may be entitled to recover by reason of the damage to or destruction of said books and records. If the jury so find for the plaintiff, the measure of damages would be the reasonable costs and expense of restoring and replacing said books and records, as nearly as practicable, as they were before the fire but not to exceed the sum of \$1,200."

The court, at the request of the defendants below, also gave the following instructions:

"You are instructed by the court that under the evidence in this case, you are to determine whether or not the leaving the books in the court room at the time of the fire was, under all the circumstances, negligence on the part of Spear. If it was not negligence on his part, then you should find for the sureties, Toncray, Muller, Knoell, and Brunke."

And the following, as modified:

"You are instructed by the court that the clerk of the district court was not subject to the directions of the county board as to his duties, but was subject to the directions of the district court or judge thereof. (Modified as follows:) It was the duty of Spear as such clerk to keep his office in

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the place provided for him by the county, and it was also his duty to use all the means and appliances provided for him by the county for the safe-keeping of the books and records pertaining to his office in so far as the means so provided were reasonably adapted to render the keeping of said books more safe or secure from injury by fire."

These instructions, taken together, submitted the questions of fact fairly to the jury, and we see no error in them.

A number of instructions were asked on behalf of the defendants below, most of which had already been given by the court, and the others were properly refused. Some objection is made to the amount of the recovery. There is a failure, however, to prove that the amount paid was in excess of the damages. This objection, therefore, is unavailing. There is no error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

IN RE A. D. WHITE.

[FILED JANUARY 27, 1892.]

1. **Habeas Corpus: INDIVIDUAL SUPREME JUDGES CANNOT GRANT.** The original jurisdiction of the supreme court in *habeas corpus* proceedings is conferred on the court, and not on the judges singly. There is no authority, therefore, for a judge of the court alone to grant or hear a writ of *habeas corpus*.
2. ———: **LOCUS: REVIEW.** Ordinarily the proceedings should be instituted in the county where the unlawful restraint is alleged to exist, and the proceedings may be reviewed on error.
3. **Statutes: AMENDMENT.** The Compiled Statutes having been published under authority of law, and being supposed to contain all the laws in force at the date of publication, may be

33 812
34 809
33 812
49 781
33 819
45 893
33 812
150 164
38 812
61 257

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amended by a proper reference thereto, and if the amendatory act clearly points out the portion of the statute amended, the objection that the amendment is of the Compiled Statutes will be unavailing.

4. ———: ———. Under the title of "An act amendatory of, and supplemental to, chapter 50 of the Compiled Statutes of 1885, entitled 'Liquors,' " additional matter germane to the purpose of chapter 50 may be added.
5. ———: TITLES. The legislature has the right to choose the title of any act passed by it, and although that chosen may not be the most appropriate, yet, unless the act is not within the title, or contains two or more subjects, or otherwise violates the constitution, it would not be declared unconstitutional.

ORIGINAL application for writ of *habeas corpus*.

J. S. Armstrong, R. S. Williams, and Albert & Reeder,
for petitioner.

MAXWELL, CH. J.

As cause for granting the writ the petition alleges:

"That he, the relator, is unlawfully restrained and deprived of his liberty in Boone county, Nebraska, by William J. Ferris, sheriff of said county.

"Second—That the alleged cause of the petitioner's said restraint and detention is, that the petitioner was arrested upon a complaint made against him before Manley B. Boordman, a justice of the peace in and for said Boone county, charging the petitioner with unlawfully keeping malt, spirituous, and vinous liquors in said county with intent to sell the same without license, and contrary to law.

"Third—That upon a hearing had before said justice of the peace on the 15th day of January, 1892, the petitioner was held to answer said charge, and to appear at the next term of the district court of said county, and in default of bail, the amount of which was fixed by said justice at \$500, was committed under a warrant of commitment to the county jail of said county. * * *

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"Fourth—Your petitioner alleges that chapter 33 of the Laws of 1889, under which said charge and complaint was made against him, is unconstitutional and void for the reasons following:

"1. Because the same is amendatory of chapter 50 of the Compiled Statutes of Nebraska, and is not complete in itself, and does not contain and does not repeal the said chapter 50 of the Compiled Statutes so amended, nor any part thereof.

"2. Because the said chapter 33 of the Laws of 1889 amends section 11 of chapter 50 of the Compiled Statutes of Nebraska, and does not contain nor repeal said section so amended.

"3. Because said chapter 33 is amendatory of section 17 of chapter 7 of the Compiled Statutes, and the sections regulating the duties and compensation of the county attorney, and does not contain the sections so amended and does not repeal the same.

"4. Because the subject of said chapter 33 is not clearly expressed in its title.

"5. Because said chapter 33 is in conflict with the bill of rights in not requiring a particular description of the premises to be searched and of the person and thing to be seized."

Application for the writ was made to one of the judges of this court, but as he had doubt as to his power to issue the writ as a single judge, he refused to issue the same and submitted the matter to his associates for their consideration.

The original jurisdiction of this court to issue a writ of *habeas corpus* is conferred upon the court by the constitution, and not upon the several judges thereof. The judges thereof severally have no authority to grant the writ, as, when the petition is filed here, the writ must be granted by at least two of the judges. A single judge of this court, therefore, cannot grant the writ. There is an abundant

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provision for the granting of the writ, as it may be applied for to any county judge or judge of the district court, and the several rulings thereon of the district court may be brought into this court for review on error. As a general rule, therefore, the proceeding should be instituted in the county where the alleged unlawful restraint is being exercised; and where, if it is necessary to call witnesses, the parties will not be subjected to unnecessary expense and inconvenience. The case may then be reviewed on error as in other cases. (*Ex parte James Collier*, 6 O. St., 55; *Ex parte Warmes*, supreme court of Nebraska, 1877, cause removed to United States court before final judgment, and not reported.)

Chapter 33 of the Laws of 1889 is as follows:

"AN ACT amendatory of, and supplemental of, chapter 50 of the Compiled Statutes of 1885, entitled 'Liquors.'

"Be it enacted by the Legislature of the State of Nebraska:

"Section 1. To be numbered section 20 of said chapter 50. Hereafter it shall be unlawful for any person to keep for the purpose of sale without license any malt, spirituous, or vinous liquors in the state of Nebraska, and any person or persons who shall be found in possession of any intoxicating liquors in this state, with the intention of disposing of the same, without license, in violation of this chapter shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned as provided in section 11 of this chapter; *Provided*, That this shall not apply to physicians or druggists holding permits for the sale of liquors for medicinal, mechanical, chemical, or sacramental purposes, or persons having liquors for home consumption. If any creditable resident freeholder of any county in this state shall, before any police judge, county judge, or justice of the peace, make complaint and information in writing and on oath that he has reason to believe, and does believe, that any intoxicating liquor, describing it as particularly as may be in said complaint, is in said county,

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in any place, described as nearly as may be in said complaint, owned or kept by any person named or described in said information as particularly as may be, and is intended to be, or is being, by the person named or described in said complaint sold without license in violation of this chapter, said magistrate shall, upon filing said complaint, and believing there is probable cause therefor, issue his warrant for the search of the premises described in said complaint and the arrest of the person therein named or described as the case may be, naming and describing the liquors, person, and premises as in the complaint, which warrant shall be directed to the sheriff, city or village marshal or constable as the complaint may request, and said warrant shall further command the officer that if after a thorough and diligent search of said premises, he shall seize the said liquor, with the vessels containing it, and to keep the same securely until final action be had thereon, and immediately arrest the person named or described in said warrant or the person in charge of the said liquors, and bring him before said magistrate for examination; and the possession of any of said liquors shall be presumptive evidence of a violation of this chapter and subject the person to the fine prescribed in section 11, unless after examination he shall satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose. Where any liquors shall have been seized by virtue of any such warrant the same shall not be discharged or returned to any person claiming the same, by reason of any alleged insufficiency of the description in the complaint, or warrant, of the liquor or places, but the claimant shall be entitled to an early and speedy hearing on the merits of the cause; *Provided*, That in case the place described in said complaint, and to be searched, is the residence of the person named or described in said complaint, or any other person, then and in that case the warrant shall not issue unless the complaint shall state that within thirty days

immediately preceding the filing thereof that liquor, describing it, has been sold therein in violation of this chapter.

"Sec. 2. To be numbered section 21 of said chapter 50. If upon said examination the magistrate hearing the same shall be satisfied that the person named or described in the complaint, or found in possession of said liquors and premises described therein, had been selling liquors without license in violation of this chapter, or had said liquors so seized in his or her possession with intent to dispose of the same in violation of this chapter, said magistrate shall hold said person so arrested for trial at the next term of the district court, and shall order the liquors so seized destroyed by the officer having them in charge; *Provided*, The defendant may appeal from said order to the district court, in which case the liquors shall abide the result of the trial of the defendant in the district court, and if there convicted he shall be fined or imprisoned as in this chapter provided, in the discretion of the court, and the court shall further order said liquors destroyed, as if the appeal herein provided for had not been taken.

"Sec. 3. To be numbered section 22 of said chapter 50. In case the defendant is acquitted, he shall be discharged and the liquors returned, but if found guilty, in addition to the payment of a fine he shall pay all costs of prosecution, including a reasonable attorney fee to the prosecuting attorney (in case the county attorney does not prosecute), to be determined by the court, in no case less than \$25, which shall be taxed in the costs and recovered as other costs. If the defendant be discharged, the costs shall be paid by the complaining witness, unless the court shall sustain the finding that there was probable cause for the complaint. If no one is found in the possession of said premises where said liquors may be found, the officer taking the same shall post in a conspicuous place on said building or premises a copy of his warrant, and take possession of said liquors and the vessels containing the same, and hold them

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subject to the order of the magistrate, and make return of his doings to the magistrate issuing the warrant. Whereupon it shall be the duty of the magistrate to fix a time for the hearing of the question of the purposes for which said liquors were kept, and issue a notice thereof to the officer, who shall post a copy thereof on the building or premises where the liquors were found; *Provided*, That the day so fixed shall not be less than five nor more than ten days from the date of the issuance of said notice. If at the time fixed for said hearing no person appears, or if any person does appear, after a hearing, the magistrate shall be satisfied that said liquors were being kept and sold, or with the intention and for the purpose of being sold in violation of this chapter, the magistrate shall order the same destroyed, and in case there is no appearance by any one claiming to be the owner of said liquors, the costs shall be paid by the county in which the complaint is brought. For cases where the defendant is acquitted, and if any one appears and resists the complaint, he shall be adjudged to pay the costs if the liquor be ordered destroyed; *Provided*, The possession of said liquors are not found to be for an unlawful purpose, the magistrate shall order them returned to the place where seized.

“Approved March 30, 1889.”

The first objection to this act is that it is amendatory of chapter 50, Compiled Statutes, and is not complete in itself and does not repeal chapter 50. The act in question does not purport to change any part of chapter 50 of the Compiled Statutes, but simply adds thereto additional provisions, which are to be incorporated into chapter 50 as sections numbered 21 and 22. This is not prohibited by the constitution. The Compiled Statutes were printed under authority of law and were supposed to contain a correct compilation of the laws in force in the state when the book was published. Being a standard book, the legislature in amending a statute may refer to a particular part of a statute set forth

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in such work. All that is required in such case is a reasonable degree of certainty as to the statute to be amended. That is clear in this case, and the reference to the Compiled Statutes is sufficient. But it is said that the title is too indefinite. By this we understand that the applicant contends that the legislature should point out in the title of the act its purpose, and that if it fails to do so the act is void. In disposing of this question we must consider the object of the provision of the constitution which requires that "no bill shall contain more than one subject, which shall be clearly expressed in its title." The object was to prevent surreptitious legislation by prohibiting the introduction of matter into a bill which had no connection with the general purpose of the bill. (*White v. City of Lincoln*, 5 Neb., 505; *City of Tecumseh v. Phillips*, Id., 305; *People v. Mahaney*, 13 Mich., 494.) In the latter case it is said: "The practice of bringing together into one bill subjects diverse in their nature and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislature and dangerous to the state." The legislature, however, is a co-ordinate branch of the government. It must be allowed to choose its own title to a bill passed by it, and if the title of such bill is not in conflict with the constitution, this court will not declare the act void.

In *Comstock v. Judge*, 39 Mich., 195, under a constitutional provision substantially like our own, the court condemned the practice of amending an act by reference to sections, but held that where the amendment is plain and can be carried out it will be held valid and sustained. (*People v. Common Council*, 38 Mich., 636; *Bowman v. Cockrill*, 6 Kan., 311; *Prescott v. Beebe*, 17 Id., 320; *State v. Bankers, etc.*, 23 Id., 499; *City of Kansas v. Payne*, 71 Mo., 159; *State v. Ranson*, 73 Id., 78; *Miller v. Hurford*, 13 Neb., 13.)

U. S. Natl. Bank v. Bonacum.

The validity of chapter 50 was before this court in *Pleuler v. State*, 11 Neb., 547. The attorneys on both sides were among the ablest in the state and were given sufficient time to present their arguments and authorities for and in opposition to the law, and after a full and careful examination of the entire case the act was sustained. The title of that act shows its general purpose, and any amendment which is germane to that purpose and to be included in two new sections may be made under a title like the one in question. As there were no sections to amend there were none to be repealed, so that objection need not be considered. In regard to the provision for searching for liquors, even if held to be in conflict with the constitution, it would not affect the remainder of the act. It is sufficient to say that the place to be searched must be particularly described in the oath or affirmation, and unless so described the right of search does not exist. But that is a secondary question in this case. No sufficient cause is shown for the issuing of the writ and it is

DENIED.

THE other judges concur.

U. S. NATL. BANK, APPELLEE, V. THOMAS BONACUM
APPELLANT.

[FILED JANUARY 27, 1892.]

1. **Mechanics' Liens: FURNACES IN CHURCH BUILDINGS: REVIEW.** In an action to foreclose a mechanic's lien upon a church building there was testimony tending to show that one R., the pastor of the church, was its agent in purchasing materials, etc., and that he contracted for two furnaces which were placed in the building; there was testimony tending to show the furnaces were purchased under a written memorandum or

contract, and likewise that they were furnished under a verbal contract. *Held*, That the finding of the trial court in favor of the plaintiff, that they were furnished under a verbal contract, would be sustained.

2. ———: ———: DEFECTS: VIEW: REVIEW. Where one of the defenses of the action was defects in the furnaces, by which they were of but little value, the trial judge, by consent of the parties, examined the furnaces and allowed \$100 for such defects, his judgment will not be set aside in the absence of a showing that it is clearly wrong.
3. ———: ———. A mechanic's lien will lie for furnaces placed in a building.

APPEAL from the district court for Lancaster county.
Heard below before FIELD, J.

Sawyer & Snell, for appellant, cited, contending that Roth alone could have sued on the contract, and that he was not appellant's agent: *Stone v. Wood*, 7 Cow. [N. Y.], 453; *Williams v. Christie*, 10 How. Pr. [N. Y.], 17; *Evans v. Wells*, 22 Wend. [N. Y.], 331. That the lien would not attach for a furnace: Note to *Hubbell v. East Cambridge*, 42 Am. Rep. [Mass.], 447.

Fawcett & Sturdevant (John P. Davis, of counsel), *contra*, cited, contending that the furnaces were fixtures and subjected the premises to a lien: 2 Jones, Liens, sec. 1343; *Cohen v. Kyler*, 27 Mo., 122; *Goodin v. Elleardsville Hall Ass'n*, 5 Mo. App., 289; *Freeman v. Lynch*, 8 Neb., 199; *Teaff v. Hewitt*, 1 O. St., 529.

MAXWELL, CH. J.

This action was brought in the district court of Lancaster county by the plaintiff against the defendant to enforce a mechanic's lien for \$650 upon lots 7 and 8, block 2, Laverder's addition to Lincoln, upon which the German Catholic church is erected. The lien is based upon a contract with one H. M. Roth, the pastor of the congregation when the

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building was being erected, for two furnaces put into said building by one Sullivan. He (Sullivan), after the erection of the furnaces, assigned the account to the plaintiff. Issues were joined by the parties, and on the trial of the cause the court below rendered judgment in favor of the plaintiff for the sum of \$550, from which the defendant appeals. In substance, there are three defenses pleaded to the action: First, that Roth had no authority to bind the church; second, that the furnaces are defective and of but little value; and third, that they do not constitute such fixtures or appurtenances as will entitle the plaintiff to a mechanic's lien. Mr. Roth died a few months after the making of the contract.

It is claimed on behalf of the defendant that the work was performed under a written memorandum or contract set out in the record. This the plaintiff denies, and claims that the work was performed under a verbal contract, and there is testimony supporting this view of the case sufficient to sustain the judgment. It is denied also that Roth was the agent of the church so as to bind it by any contract made by him. The testimony, however, tends to show such agency in the erection of the building. It is true that the church committee had intended to heat the building with stoves and so informed Mr Roth after he had entered into the contract for furnaces, when he said, "I will pay for the whole business myself." By this we do not understand that any change was to be made with the contractor for the payment of the furnaces. Mr. Roth, evidently, was not satisfied to have the building heated with stoves, and took this mode of showing his dissatisfaction. Had he lived he, no doubt, would have kept his word, and paid for the furnaces, but his promise to the committee did not relieve the church from liability.

2. The judgment shows that by consent of the attorneys of both parties the judge before whom the trial took place personally examined the furnaces, and allowed \$100 for

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all deficiencies therein, which he considered a liberal allowance, and we must so consider it. Evidently the furnaces are in a pretty good condition.

3. A furnace when placed in a building becomes an appurtenance to the same and a mechanic's lien will attach thereto. It is unnecessary to cite authorities in support of this view. There is no error in the record and the judgment is .

AFFIRMED.

THE other judges concur.

**STATE, EX REL. COUNTY OF SEWARD, V. THOS. H.
BENTON, AUDITOR.**

[FILED JANUARY 27, 1892.]

1. **County Bonds: REFUNDING.** In 1877 the legislature passed "An act to authorize the issue of county bonds in certain cases." This provided for issuing refunding bonds to replace bonds issued to railroad companies or any work of internal improvement. This act was carried into the Compiled Statutes of 1881 as sections 11, 12, and 13, chapter 45. In 1883 the legislature passed an act to authorize counties to issue refunding bonds, at not to exceed six per cent interest, to replace other bonds previously issued by the county and then payable. *Held*, That the act of 1883 applied to all bonds previously issued by a county and then payable.
2. **Statutes: REPEAL BY IMPLICATION.** The act of 1883 is a complete act, covering the whole of the matter embraced in the act of February 19, 1877, and repeals the first named act by implication.
3. ———: ———. In 1885 the legislature passed an act amending sections 11, 12, and 13 of chapter 45 of the Compiled Statutes, which had been repealed by implication by the act of 1883. *Held*, That the amendatory act of 1885 was invalid.
4. **County Bonds: REFUNDING.** Under the act of 1883, where a

33	823
33	835
33	835
36	424
33	823
46	734
33	823
48	825
48	873
33	923
50	520
53	565
33	823
62	41
62	42

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county has issued refunding bonds bearing interest at six per cent, it may, after such bonds are payable, issue other refunding bonds at a lower rate of interest, as four and one-half per cent, to replace them.

ORIGINAL application for *mandamus*.

Ed. C. Biggs and Bowman & Smith, for relator:

The act of 1877 was repealed by the act of 1883, and the pretended amendment thereof in 1885 is a nullity. (*Knox County v. McComb*, 19 O. St., 320; *Dutton v. Aurora*, 114 Ill., 138; *Stingle v. Nevel*, 9 Ore., 62; *Haynes v. Cape May*, 52 N. J. L., 180; *Pennie v. Reis*, 80 Cal., 266; *Maxwell v. State*, 7 S. Rep. [Ala.], 824.) The bonds now sought to be refunded are not internal improvement bonds, and hence the act of 1883 alone applies. Section 2 of the act of 1883 is not a limitation upon the right to issue refunding bonds, but extends the right. (*Wayman v. Cochrane*, 35 Ill., 152; *Runnamaker v. Cordray*, 54 Id., 303.)

Geo. H. Hastings, Attorney General, contra.

MAXWELL, CH. J.

The plaintiff complains of the defendant and states: That the plaintiff is a county of the state of Nebraska, duly and legally incorporated and organized under the laws of the said state, and the defendant is the duly and legally elected, qualified, and acting, auditor of public accounts of the said state, and charged by law with the performance of the duties hereinafter mentioned.

2. The plaintiff further states to the court that on and prior to the first day of June, A. D. 1884, the plaintiff county was indebted to sundry persons in the sum of \$104,000, said indebtedness being evidenced by certain coupon bonds for the said amount duly and legally issued by the said county.

3. That on the first day of June, 1884, the plaintiff county, by virtue of the power conferred upon it by chapter 18 of the Statutes of Nebraska, to-wit, the act entitled "An act to authorize counties to issue bonds for refunding their bonded indebtedness, and provide for registering and certifying the same, and for levying a tax to pay the interest and principal thereof," which said act was approved and took effect February 28, 1883; that under and by virtue of the power the plaintiff county, in the manner therein provided, issued its refunding bonds in the sum of \$104,000, said bonds being dated the 1st day of June, 1884, bearing interest at the rate of six per cent per annum, payable semi-annually, and due on or before twenty years after the date thereof, at the option of the plaintiff county; that the said bonds were issued in strict accordance with the law in such cases made and provided, and were duly and legally registered and certified by the auditor of public accounts and secretary of state of the state, and after being so registered, and certified in the manner provided by law, the same were sold, and with the proceeds derived from the sale thereof, the plaintiff county paid off the indebtedness herein first mentioned, the bonds evidencing the same being canceled and surrendered up to the plaintiff county.

4. The plaintiff states that the bonds so issued on the 1st day of June, 1884, were a legal and binding obligation against the said county of Seward, and constitute a valid debt of the same.

5. The plaintiff further states that the interest upon the bonds so issued on the 1st day of June, 1884, has all been paid up to and including the interest that fell due on the 1st day of June, 1891, but that no part of the principal thereof has been paid except \$4,000 thereof, nor has the said county levied or collected any taxes or assessments with which to pay the principal thereof, except as herein-before stated.

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6. The plaintiff further states that prior to the 1st day of May, 1891, a contract was entered into by and between the holders of the said bonds so issued on the 1st day of June, 1884, and the plaintiff county, by the terms of which the said holders of the said bonds agreed to accept in substance and exchange for the said bonds so issued on the 1st day of June, 1884, refunding bonds of the plaintiff county in the sum of \$100,000, said bonds to bear interest at the rate of four and one-half per cent per annum, payable semi-annually, bearing date the 15th day of May, 1891, and due in twenty years after the date thereof, or at any time the plaintiff county might elect after five years from date thereof; said substitution and exchange to be made on the basis of dollar for dollar, i. e., refunding bonds for \$100,000, dated May 15, 1891, bearing four and one-half per cent interest, and dated the 1st day of June, 1884. And this plaintiff states that it has reason to believe, and does believe, both parties to the said contract are willing to fully carry out and execute the terms of the same as herein set forth.

7. The plaintiff further states that for the purpose of carrying out the terms and provisions of the said contract, and for the purpose of lawfully issuing its refunding bonds to be so submitted and exchanged, the county board of the said plaintiff county, at a regular session thereof, held on the 3d day of March, 1881, authorized the issuance of the said bonds and adopted certain resolutions relative thereto, a true and certified copy of which is hereto attached, marked "Exhibit A," and made a part hereof.

8. The plaintiff states that in pursuance of the said action and resolution of the said county board, and by virtue of the power conferred upon the said plaintiff county by that part of chapter 18 of the Statutes of Nebraska, more fully described as "the act passed, approved and which took effect February 28, 1883, being "An act to authorize counties to issue bonds for refunding their bonded

indebtedness, and provide for registering and certifying the same, and for levying a tax to pay the interest and principal thereof," the said county issued its said bonds in the sum of \$100,000, bearing date the 15th day of May, 1891, bearing interest at the rate of four and one-half per cent per annum, said bonds being numbered from 1 to 100 inclusive and each for the sum of \$1,000, the same being due in twenty years from the date thereof, at the option of the plaintiff county; the said bonds being executed in all respects as required by law and in pursuance of the action of the county board as herein set forth, a copy of said bond, save the signature, is hereto attached, marked "Exhibit B," and made a part hereof.

The plaintiff states that after the said bonds were authorized in the manner aforesaid the same were signed by the chairman of the county board of the said county in his official capacity, and attested by the county clerk thereof with his official seal, the same were then presented to the defendant, as the auditor of public accounts for the state of Nebraska, together with a certified copy of the proceedings of the county board relative thereto, said bonds being presented to the defendant for registration and certification in the manner provided by law, but though tendered his fees therefor the said defendant failed and refused to register the same, and still fails and refuses to do so.

The plaintiff therefore prays the court for a writ of *mandamus* requiring the defendant to appear and show cause why the said bonds should not be registered and certified by him, and that upon the hearing he be required to register and certify to said bonds in his official capacity, as required by law, and conform to such other order as the court may deem just and legal, and to which the plaintiff is entitled in the premises.

A number of minor objections are made by the defendant to the petition which need not be noticed, but we will proceed at once to the consideration of the main question

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in the case, viz.: The authority of the county board of Seward county to issue the bonds in question.

In 1877 an act was passed by the legislature, entitled "To authorize the issue of county bonds in certain cases." This act was as follows:

"Section 1. That any county, precinct, or city in the state of Nebraska which has heretofore voted and issued bonds to aid in the construction of any railroad or other work of internal improvement, and which bonds, or any part thereof, still remain unpaid, and remain and are a legal liability against such county, and bearing interest at ten per centum per annum, is hereby authorized to issue coupon bonds at a rate of interest not exceeding eight per centum per annum, to be substituted in place of, and exchanged for, such bonds heretofore issued, whenever such county, precinct, or city can effect such substitution and exchange, which substitution and exchange shall be dollar for dollar.

"Sec. 2. The new bonds so issued shall have recited therein the object of its issue, the whole of the act under which the issue is made, stating the issue to be in pursuance thereof, and shall also state the number, date, and amount of the bond or bonds for which it is substituted, and such new bond shall not be delivered until the surrender of the bond or bonds so designated.

"Sec. 3. The new bonds so issued shall not require a vote of the people to authorize such issue, and they shall be paid, and the levy be made and tax collected for their payment in accordance with laws now governing the said bonds heretofore issued.

"Approved February 19, A. D. 1877."

In 1883 the legislature passed "An act to authorize counties to issue bonds for refunding their bonded indebtedness, and provide for registering and certifying the same, and for levying a tax to pay the interest and principal thereof." This act is as follows:

"Section 1. That any county of this state is hereby authorized to issue its coupon bonds at a rate of interest not exceeding six per cent per annum, for the purpose of refunding its bonded indebtedness, said bonds to be substituted in place of and exchanged for bonds heretofore issued whenever such county can effect such substitution and exchange, which substituted bonds shall equal the amount due for principal and interest of such bonded indebtedness, with interest payable semi-annually, and the principal payable not exceeding twenty years from their date.

"Sec. 2. The provisions of the foregoing section and of this act shall apply to and include all bonds heretofore issued by any county which have been held and determined to be valid and binding in the hands of *bona fide* holders thereof, in any action or actions thereon, or on any coupon thereof, by any state or federal court of competent jurisdiction within this state, and such bonds with the interest thereon constitute a bonded indebtedness within the meaning of this act.

"Sec. 3. That in all cases where the bonds of any county are past due, and in all cases where counties have issued bonds that were redeemable at the option of the county board at a fixed time, and where said time has elapsed, the county board shall notify the holders of such bonds to present the same for redemption or exchange and substitution, and in case of the refusal of such bondholders to present the same for redemption or exchange and substitution, at the place where said bonds are made payable, the county shall not be liable to pay interest on said bonds in excess of the rate provided for as the interest of said refunding bonds, and such interest shall commence with the coupon next to become due after such notice has been given.

"Sec. 4. That in case an exchange of said bonds cannot be effected the county commissioners are hereby authorized

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to sell said refunding bonds from time to time, at not less than their face value, in such sums as may be necessary to create a fund for the redemption of the outstanding bonds aforesaid, and the money realized from the sale of said refunding bonds shall not be expended or used for any other purpose than for refunding said outstanding bonds.

"Sec. 5. It shall be the duty of the auditor of state to register such substituted bonds, and of the secretary and auditor of state to certify the same, and a tax to pay the interest and principal thereof shall be levied in the same manner as is now provided by law or the constitution in the case of other county bonds.

"Sec. 6. That the county clerk of each county shall certify under the seal of the county to the auditor the number, amount, and description of each bond canceled or to be canceled and refunded, and the amount due thereon for principal and unpaid interest, and thereupon the auditor is authorized to register a similar amount of refunding bonds; but in no case shall the auditor register any refunding bonds in excess of the amount so certified to him by the county clerk as aforesaid; and that said bonds shall be entitled to registration as aforesaid in the order that they are presented to the auditor.

"Sec. 7. That the registration provided for in this act shall apply to all refunding bonds already issued or to be issued in conformity to the provisions of this act.

"Sec. 8. That counties are hereby authorized to refund their bonded indebtedness as provided for in this act, at dollar for dollar of said indebtedness, irrespective of the fact that said indebtedness exceeds ten per cent of the present valuation of the property of said county, and the same shall be registered as provided for in this act; and the refunding bonds hereby authorized may be issued by the commissioners of the county without submitting the proposition therefor to a vote of the electors.

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"Sec. 9. That whereas an emergency exists, this act shall take effect from and after its passage.

"Approved February 28, A. D. 1883."

It will be observed that this act is complete in itself, and is broader and much more comprehensive than the act of 1877. It covers the class of bonds authorized to be issued by the act of 1877, and also all other bonded indebtedness.

It is claimed on behalf of the defendant "that the provisions of section 2 limit the rights of refunding to such bonds as have been held and determined to be valid and binding, in the hands of *bona fide* holders in any action or actions thereon, or on any coupon thereof, by any state or federal court of competent jurisdiction within this state." The language of the second section, however, clearly shows that such was not the intention. In the first section the power is given to issue the coupon bonds at a rate not exceeding six per cent, for the purpose of refunding its bonded indebtedness. This includes all bonded indebtedness, and the second section merely adds to this such bonds whose validity has been questioned but have been held to be valid by a competent tribunal, as in *State v. Alexander*, 14 Neb., 280. In the case cited the federal circuit court had sustained the bonds, and the attorneys for the county then believed that the federal supreme court would sustain them also, and sought to have the bonds refunded.

The act of 1883, as we view it, is a general law and applies to all bonded indebtedness of a county, and this court has no right to inject words of limitation therein. In effect, it is a remedial statute and the ordinary rules of construction as applied to such statutes are applicable to this. Refunding bonds can only be issued to take the place of bonds duly issued by the county, and section 6 of the act requires the county clerk, under the seal of the county, to certify to the auditor "the number, amount, and

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description of each bond canceled or to be canceled and refunded, and the amount due thereon for principal and unpaid interest. The auditor is thereupon authorized to register a similar amount of refunding bonds," but no more. Section 7 provides that the act shall apply to all refunding bonds, and the eighth section authorizes the refunding of bonded indebtedness, although it may exceed ten per cent of present value of the property. Broader, or more comprehensive language could scarcely be used, and it was evidently the intention to cover all cases of bonded indebtedness. As the act of 1883 fully covers all the matter embraced in the act of 1877, and is much broader and more comprehensive than that act, it repeals it by implication. The provisions of the act of 1877 were incorporated into the Compiled Statutes of 1881 as sections 11, 12, and 13 of chapter 45, which, as we have seen, were repealed by implication by the act of 1883.

In 1885 the legislature passed "An act to amend sections 11, 12, and 13 of chapter 45 of Compiled Statutes of 1881, entitled 'Internal improvements,' and to repeal said sections. This act authorizes any county or city which has heretofore issued bonds to aid in the construction of any railroad or other work of internal improvement which is a legal liability against the county, precinct, or city, and bearing interest at a greater rate than seven per cent, to issue bonds in exchange for the same, bearing interest at a rate not to exceed seven per cent. This act requires four weekly publications to be made before issuing the refunding bonds. The objection to this act is that it is based upon and proposes to amend an act which had previously been superseded by the act of 1883. In speaking of repeals by implication, Judge Sutherland, in his recent valuable work on Statutory Construction, sec. 140, says: "Repealing effect of affirmative statutes conferring power and regulating its exercise. In organizing the powers of government there is a definite and precise scheme or plan, and

a unity and singleness of means employed to carry it into effect. There is but one chief magistrate, one legislature, one judiciary. There is but one revenue system, one police system. Public duties are defined and imposed on officers designated with certainty, without duplications or confusion, except by inadvertence. The exercise of power by one over another must be authorized by law; its possession and scope will be such as is granted; when granted, if the mode of its exercise be also prescribed, it must be followed. In the grants, and in the regulation of the mode of exercise, there is an implied negative, an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode." It is true repeals by implication are not favored, but where there is a complete act covering the whole subject, as in that of 1883, it was clearly intended by the legislature to be exclusive to repeal the act above referred to, of 1877, as sections 11, 12, and 13 of the Compiled Statutes of 1881. These sections, therefore, were not in force when it was sought to amend them by the act of 1885. The general rule in such case is that the amendatory act is void, having nothing to rest upon. The act of 1883, therefore, is still in full force.

It appears that the present holder of the bonds of Seward county is willing to accept a lower rate of interest than the sum now being paid. The county board has taken the necessary steps to refund such bonds, and thus enable the county to have the lower rate of interest. This was clearly within the power of such board, and upon the presentation of the proper certificate from the county clerk of Seward county to the auditor showing that the refunding bonds presented to him are valid, it is his duty to certify the same. It follows that a peremptory writ will be

ISSUED AS PRAYED.

THE other judges concur.

STATE, EX REL. GAGE CO., V. THOS. H. BENTON.

[FILED JANUARY 27, 1892.]

County Bonds: REFUNDING. County bonds issued to aid in the construction of works of internal improvement can be refunded only under the provisions of the act of February 28, 1883, entitled "An act to authorize counties to issue bonds for refunding their bonded indebtedness, and providing for registering and certifying the same, and for levying a tax to pay the interest and principal thereof."

ORIGINAL application for *mandamus*.

Charles O. Bates, for relator.

Geo. H. Hastings, Attorney General, *contra*.

NORVAL, J. .

This is an original application to this court for a peremptory writ of *mandamus* to compel the respondent, as auditor of public accounts, to register certain refunding bonds issued by Gage county. There is no controversy upon the facts.

On the 1st day of July, 1871, the county of Gage duly issued its bonds to the amount of \$50,000, bearing eight per cent interest per annum, payable semi-annually, due in twenty years from date, to aid in the construction of the Omaha & Southwestern railroad.

On the 9th day of June, 1891, the county board of said county adopted a resolution to refund said bonds by the issue of the coupon bonds of said county to the amount of \$50,000, to be dated July 1, 1891, due in twenty years from their date, at five per cent interest, payable semi-annually, and instructed the chairman of the board and the county clerk to execute and issue said bonds and to present the same to the auditor for registration. Pursuant to said

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resolution said bonds were issued and presented to the respondent for registration, who refused to register the same. These refunding bonds were issued under the provisions of an act of the legislature of this state, entitled "An act to authorize counties to issue bonds for refunding their bonded indebtedness, and providing for registering and certifying the same, and for levying a tax to pay the interest and principal thereof," approved February 28, 1883. Each bond recites on its face that it "is issued for the purpose of refunding one series of bonds heretofore issued by the said county of Gage, and dated the 1st day of July, A. D. 1871, for the sum of \$50,000 and accrued and unpaid interest, issued to the Omaha & Southwestern Railroad Company, to aid in the construction of said railroad into said county, which remain unexchanged and unpaid, and payable twenty years from date thereof, with interest at eight per cent per annum, payable semi-annually."

The respondent contends, first, that bonds issued to aid in the construction of works of internal improvements cannot be refunded under the provisions of the act of 1883 above referred to; second, the act is limited in its scope, by the second section thereof, to bonds which have been held and determined to be valid obligations in the hands of *bona fide* holders by a court of competent jurisdiction in an action thereon, or on some coupon thereof; third, internal improvement bonds can be refunded only under the provisions of chapter 59 of the Session Laws of 1885.

The same propositions were fully considered in the opinion in the case of *State, ex rel. Seward County, v. Benton*, filed herewith, *ante*, p. 823, and were decided adversely to the contention of the respondent. Following that decision, the bonds in the case at bar are entitled to registration. A peremptory writ is

ALLOWED.

THE other judges concur.

State, ex rel. Gage Co., v. Benton.

STATE, EX REL. GAGE CO., V. THOS. H. BENTON.

[FILED JANUARY 27, 1892.]

County Bonds: REFUNDING. County bonds issued to aid in the construction of works of internal improvement can be refunded only under the provisions of the act of February 28, 1883, entitled "An act to authorize counties to issue bonds for refunding their bonded indebtedness, and providing for registering and certifying the same, and for levying a tax to pay the interest and principal thereof."

ORIGINAL application for *mandamus*.

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NORVAL, J. .

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On the 9th day of June, 1891, the county board of said county adopted a resolution to refund said bonds by the issue of the coupon bonds of said county to the amount of \$50,000, to be dated July 1, 1891, due in twenty years from their date, at five per cent interest, payable semi-annually, and instructed the chairman of the board and the county clerk to execute and issue said bonds and to present the same to the auditor for registration. Pursuant to said

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resolution said bonds were issued and presented to the respondent for registration, who refused to register the same. These refunding bonds were issued under the provisions of an act of the legislature of this state, entitled "An act to authorize counties to issue bonds for refunding their bonded indebtedness, and providing for registering and certifying the same, and for levying a tax to pay the interest and principal thereof," approved February 28, 1883. Each bond recites on its face that it "is issued for the purpose of refunding one series of bonds heretofore issued by the said county of Gage, and dated the 1st day of July, A. D. 1871, for the sum of \$50,000 and accrued and unpaid interest, issued to the Omaha & Southwestern Railroad Company, to aid in the construction of said railroad into said county, which remain unexchanged and unpaid, and payable twenty years from date thereof, with interest at eight per cent per annum, payable semi-annually."

The respondent contends, first, that bonds issued to aid in the construction of works of internal improvements cannot be refunded under the provisions of the act of 1883 above referred to; second, the act is limited in its scope, by the second section thereof, to bonds which have been held and determined to be valid obligations in the hands of *bona fide* holders by a court of competent jurisdiction in an action thereon, or on some coupon thereof; third, internal improvement bonds can be refunded only under the provisions of chapter 59 of the Session Laws of 1885.

The same propositions were fully considered in the opinion in the case of *State, ex rel. Seward County, v. Benton*, filed herewith, *ante*, p. 823, and were decided adversely to the contention of the respondent. Following that decision, the bonds in the case at bar are entitled to registration. A peremptory writ is

ALLOWED.

THE other judges concur.

HAYWARD BROS. V. FRANK J. RAMGE.

[FILED JANUARY 27, 1892.]

1. **Landlord and Tenant: USE OF PREMISES.** A tenant has no right to devote the demised premises to a business prohibited by the lease, without the consent of the owner.
2. ———: **EVICITION.** When a tenant is deprived of the use and enjoyment of the property by the acts of the landlord, the obligation to pay rent ceased. To have that effect, the acts of the lessor in interference with the lessee's possession must clearly show that it was the intention of the lessor that the lessee should no longer continue to hold the premises. A mere trespass by the landlord, without any intention of depriving the tenant of the enjoyment of the premises, will not constitute an eviction.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Isaac Adams, for plaintiffs in error, cited: *Wood, Landlord and Tenant*, 649, 796, 812; *Gear, Landlord and Tenant*, secs. 1, 87, 88, 89, 91, 92, 128, 915, 926; *Woodfalls, Landlord and Tenant*, 310; *Hall v. Gould*, 13 N. Y., 127; *Linden v. Hepburn*, 5 How. Pr. [N. Y.], 188; *Rulzen v. Lewis*, 5 Adolf. & El. [Eng.], 277*; *Cooley, Torts*, 326; *Home Life Ins. Co. v. Sherman*, 46 N. Y., 370.

Parke Godwin, *contra*, cited: *Wood, Landlord and Tenant* [2d Ed.], secs. 511, 845; page 844; *Ladd v. Smith*, 6 Ore., 316; *Thomas v. Nelson*, 69 N. Y., 119; *Townsend v. Albers*, 3 E. Smith [N. Y.], 560; *Prentiss v. Warne*, 10 Mo., 602; *Bloomer v. Merrill*, 1 Daly [N. Y.], 485; *Morris v. Tilson*, 81 Ill., 607; *Elliott v. Aiken*, 45 N. H., 30; *Fuller v. Ruby*, 10 Gray [Mass.], 285.

NORVAL, J.

This is an action to recover rent brought by Frank J. Ramge. There was a trial in the court below upon an agreed statement of facts, with judgment against Hayward Bros., the defendants, for \$680.91, to reverse which they bring error. The stipulation of facts is as follows:

"On the 26th day of March, 1887, plaintiff leased in writing to the defendants room 407 and basement thereunder on the ground floor of the store and office building known as the Ramge Block, on the southeast corner of Fifteenth and Harney streets, Omaha, Nebraska, for a term of three years from the date when the lessee should enter into possession of said premises, at the rental rate of \$100 per month, payable monthly in advance, which said lease is hereto annexed and made part hereof.

"2. Defendants entered into possession of said premises on the 15th day of July, 1887, with a boot and shoe business in accordance with the terms of said lease, which said business they continued to carry on therein until the 1st day of November, 1888, on which day, without plaintiff's consent, defendants vacated said premises, and removed their stock of goods therefrom to their present boot and shoe store on Douglas street in said city.

"3. That during the months of November and December, 1888, said premises were unoccupied, but defendants continued to pay the rent therefor up to the 1st day of January, 1889, under and in accordance with the terms of said lease.

"4. That on the 30th day of December, 1888, defendants unloaded upon the sidewalk in front of said premises a load of baled hay, without the knowledge or consent of plaintiff, and proceeded to put said hay into said store-room for the purpose of using said store for a hay and feed store. That thereupon plaintiff, as soon as he discovered defendants' movements in that behalf, stationed himself in the

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door of said store-room and forbade defendants putting said hay into said store-room for such purpose, for the reason that the use of said room for such purpose was a violation of the terms of said lease.

"5. That defendants insisted then and there upon using said premises for the purpose of carrying on a hay and feed business therein, but plaintiff then and there denied the right of defendants to use said premises for such purposes, and refused to permit defendants to enter said premises for the purpose of putting in a stock of goods in said hay and feed business, and that plaintiff ordered defendants to remove the hay they had put in said room before plaintiff discovered same, and upon their refusal to do so, removed the hay himself from said store-room out upon the sidewalk, from which last place defendants hauled the same away; that thereupon defendants vacated said premises and left the keys in the door, and have never since occupied said premises.

"6. That on the next morning plaintiff sent said keys to defendants with a letter, a copy of which is hereto attached; but defendants returned said keys to plaintiff with a message that they no longer considered themselves tenants of said premises, and have ever since refused to recognize said tenancy.

"7. That immediately thereupon plaintiff informed defendants in writing, copy of which is hereto attached, that he, plaintiff, would lease said premises to the credit and upon the account of the defendants, for the best rental he could secure, but that he would hold defendants liable to him for the difference between such rental as he might obtain and the amount agreed to be paid by defendants under said lease.

"8. That subsequently plaintiff leased said premises on account of and to the credit of defendants and gave them due notice thereof in writing (copy hereto attached) upon as favorable terms as the market afforded, and gave de-

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defendants due credit with all the rents thus received; and that the difference between the rental thus received by the plaintiff and the amount agreed to be paid by defendants according to the terms of said lease for said term of three years is the sum of \$680.91, for which sum, if the court finds defendants liable under these facts, judgment shall be entered in favor of plaintiff and against defendants."

It is claimed by the plaintiffs in error that the acts of the landlord mentioned in the stipulation constituted in law an eviction, and therefore they are released from the payment of rent. It must be conceded that where a tenant is evicted from demised premises by his landlord he is not bound to pay any rent accruing during such eviction. Such undoubtedly is the rule.

In determining whether the acts of the defendant in error terminated the lease it is important to bear in mind the terms of the lease and the purposes to which the premises were about to be devoted at the time of the alleged eviction. The written lease contained a provision to the effect that the lessees should not use the premises for any other purpose than a boot and shoe store, and that, upon the breach of any condition of the lease on the part of Hayward Brothers, the lessor, at his option, was authorized to declare the lease at an end, retake possession of the premises, and remove all persons therefrom. According to the stipulation of the parties, the defendants below occupied the premises for a time as a boot and shoe store, and then removed their stock therefrom, leaving the room vacant for two months, at the expiration of which time the tenants, in violation of the lease, commenced putting into the building a quantity of baled hay, preparatory to using the premises as a hay and feed store. Thereupon the defendant in error objected to the use of the building for such business, and ordered the plaintiffs in error to remove from the room the hay that had already been stored, and upon their refusal so to do, Mr. Ramge removed the same from the building to the sidewalk.

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The plaintiffs in error had no right to devote the building to a use different from that stipulated in the lease, without the consent of the owner. A landlord may by contract lawfully restrict his tenant's use of the property, and, in case of such agreement, if the latter use the demised premises for a purpose prohibited by the lease, it is a breach of the agreement for which the law affords relief. (*Steward v. Winters*, 4 Sanf. Ch. [N. Y.], 628; *Dodge v. Lambert*, 2 Bosw. [N. Y.], 570; *Brouwer v. Jones*, 23 Barb. [N. Y.], 153; *De Forest v. Byrne*, 1 Hilton [N. Y.], 43.)

The defendant in error had a perfect right to refuse his assent to the carrying on the hay and feed business in his building, and his objecting to the tenant's so using and occupying the same was not such an interference by the landlord as amounted in law to a termination of the lease, nor did it release the tenants from liability for rent; nor did the removal of the hay from the building by the landlord, under the circumstances, constitute an eviction. It was not done with the intention of depriving the tenants from the use and enjoyment of the premises for the purposes for which they were leased, but only to prevent their being devoted to a business not contemplated by the parties. At most, the removal of the hay from the building was a mere trespass, which did not amount to an eviction of the lessees. To terminate a lease by a landlord his acts must amount to such an interference with tenant's possession as to clearly indicate an intention on his part that the tenant shall not longer continue to hold the premises. (*Lounsbery v. Snyder*, 31 N. Y., 514; *Edgerton v. Page*, 20 Id., 281; *Hayner v. Smith*, 63 Ill., 430; *Morris v. Tillson*, 81 Id., 607; *Lynch v. Baldwin*, 69 Id., 210; *Bartlett v. Farrington*, 120 Mass., 284; *Cushing v. Adams*, 18 Pick., 110; *Mirick v. Hoppin*, 118 Mass., 582.)

Although the defendant in error had the right to terminate the lease for the breach of its conditions by the

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tenant, yet he failed to avail himself of the option, but chose to consider the agreement in force.

The plaintiffs in error, without legal cause, voluntarily abandoned the premises and left the key in the door, and on the following morning Mr. Ramge sent the key to the tenants, which they declined to accept. The plaintiff did right in leasing the premises for and on account of the defendants, having previously notified them of his purpose so to do. The reletting of the building, in view of the facts disclosed by the record, does not establish a surrender of the property, and the defendants are liable for the difference between the rent thus received and the amount of the rent reserved by the lease. (*Allen v. Saunders*, 6 Neb., 436; *Wood, Landlord & Tenant*, 847; *Bloomer v. Merrill*, 1 Daly, 485.) The judgment is

AFFIRMED.

THE other judges concur.

DWIGHT E. JOHNSON V. CHAS. L. BLAZER ET AL.

[FILED JANUARY 27, 1892.]

Review: EVIDENCE examined, and found to sustain the decree of the court below foreclosing a mechanic's lien on the real estate in controversy.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

Montgomery & Montgomery, for plaintiff in error.

John P. Davis, for appellee Blazer.

Fawcett & Sturdevant, for appellee Johnson.

NORVAL, J.

This action was commenced in the court below by Dwight E. Johnson to have declared forfeited a written contract entered into between himself and the defendant Charles E. Blazer, whereby the plaintiff had agreed to convey to Blazer, upon his making certain payments, the west forty feet of the north one-half of lot 6, in block 5, in Orchard Hill addition to the city of Omaha. To the action John A. Wakefield, who claimed a mechanic's lien on the property, was made a defendant. Wakefield in his cross-petition claims a mechanic's lien in the sum of \$633.21 and interest thereon, on account of materials furnished by him to said Blazer for the construction of a house upon the lot in controversy. The answer of Johnson and Blazer to the cross-petition deny that the materials described in Wakefield's claim for lien were furnished for or used in the erection of the building upon said lot, and aver that the account of said Wakefield against Blazer has been paid in full.

The district court found that Wakefield had furnished Blazer, to be used in the construction of a building on said lot, materials to the amount of \$633.21; that Blazer had paid thereon the sum of \$615.71, and that there was due Wakefield upon his account the sum of \$17.50, for which amount he was given a lien upon the premises. Wakefield appeals.

It is contended by appellant that under the evidence he was entitled to a lien for the full amount of his claim; that the value of the materials furnished by Wakefield to Blazer, after deducting those returned, was \$633.21, is fully proven. The controversy in this court is over the credit of \$615.71 allowed Blazer by the trial court.

It is established by the undisputed testimony that at the time of the purchase of the materials, for which appellant claims a lien, Blazer was indebted to him on two promis-

sory notes amounting to \$800 or \$900, which indebtedness was secured by a land contract on a lot in one of the additions to Omaha. In the summer of 1888, Wakefield was a wholesale and retail lumber dealer in Omaha, and Blazer was running a saw mill in Missouri and shipping to and selling in Omaha lumber in car load lots. Some time during the month of August of that year Blazer entered into a contract with Wakefield, by which the latter agreed to furnish the former the materials for the construction of a dwelling on the lot above referred to, which materials were subsequently delivered to Blazer as agreed.

There is in the bill of exceptions testimony tending to show that as a part of the same contract Blazer agreed to ship to Wakefield some cars of lumber, for which appellant promised to pay one-half in cash and was to give Blazer credit for the other half upon the lumber which Wakefield was to furnish Blazer for the construction of the house in Omaha. Appellant contends the agreement was that one-half of the value of the lumber to be shipped to him by Blazer was to be credited upon the indebtedness of Blazer to Wakefield, evidenced by the notes mentioned above. The uncontradicted testimony shows that soon after the agreement was made, Blazer shipped to Wakefield five cars of lumber, which were received by him. This lumber was of the value of \$665.71, and appellant has paid Blazer thereon \$50, and no more, and claims the balance should be credited upon the notes which he held against Blazer, and not upon the account for which he claims a lien.

Charles W. Blazer testified that the agreement was that one-half of the price of the lumber to be shipped by him to Wakefield was to be applied toward the payment of the materials which appellant was to furnish for the erection of Blazer's building. His testimony is corroborated by the witness J. A. Walker.

While the appellant, when first interrogated upon the

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subject of the agreement, testified that it was agreed that one-half of the price of the lumber Blazer was to ship was to be applied on his indebtedness, he afterwards testified he did not know whether he was to credit it on the account or on the indebtedness. It further appears that the appellant, on his books, charged Blazer with the lumber furnished for the building, and on the same account credited Blazer with the price of the five cars of lumber. On September 25, after most of the cars of lumber had been received, Blazer gave Wakefield a new note and took up the old one. No credit was given for the lumber previously received by Wakefield, but the renewal note was given for the full amount of the one taken up.

After a careful reading of the testimony in the bill of exceptions we are convinced that Blazer was entitled to a credit upon the account sued on for the value of these five cars of lumber, less the \$50, which Wakefield had paid.

The findings of the district court are sustained by the evidence, and the judgment is

AFFIRMED.

THE other judges concur.

33	844
36	344

RUFUS H. JORDAN V. JOHN KRAFT.

[FILED JANUARY 27, 1892.]

Party Walls: CONVEYANCE BY LOT OWNER SUBJECT TO. J. and K., who owned adjoining lots, entered into a written contract for the erection of a party wall on the line dividing the same, by the terms of which J. was to furnish the labor and materials and construct the wall and K. was to pay him, within a specified time after its completion, one-half the cost of sixty feet thereof, and also to pay one-half the value of so much of the remaining portion as he should use as a partition wall within thirty days after he should use the same. K. paid his share of the sixty feet

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and afterwards, but before using the partition wall, he sold his lot. The purchaser assumed in the deed the party wall agreement and afterwards joined to and used 100 feet of the party wall. In an action against K. to recover one-half the value of the remaining forty feet of the party wall, it was held that he was not liable.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

H. B. Willson, and Thompson Bros., for plaintiff in error, cited: *People v. Gosper*, 3 Neb., 310; *Hamilton v. Thrall*, 7 Id., 219; *Sch. Dist. v. Estes*, 13 Id., 53; *Harbach v. Miller*, 14 Id., 13; *Jones v. Witherspoon*, 78 Am. Dec. [N. Car.], 260; *Smith v. Jordan*, 13 Minn., 264.

Thummel & Platt, contra.

NORVAL, J.

This is an action by Rufus H. Jordan against John Kraft upon a party wall agreement to recover one-half of the cost of a portion of a party wall erected by the plaintiff on the division lines of their lots. There was judgment in the court below for the defendant.

On the 20th day of May, 1881, the plaintiff was the owner of the west one-third of lot 2, in block 65, of the city of Grand Island, and the defendant owned the center one-third part of said lot. On that day the plaintiff and defendant entered into a written agreement for the erection of a party wall on the line dividing their real estate, by the terms of which Jordan was to furnish all the labor and materials and at his own cost and expense erect, during the year 1881, a brick wall 100 feet in length and of a specified thickness and height upon said division line. Kraft agreed to pay Jordan, within sixty days after the completion of the wall, one-half of the cost of the north sixty feet thereof. The contract contained the further stipulation that "said Kraft also agrees to pay one-half of

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the actual cost of so much of the remaining portion of said wall as he shall ever use as a partition wall, within thirty days after he shall build upon and use the same. The value of the last above named portion of said wall to be fixed by the amount it would cost at the time he shall so use and build upon the same."

It is admitted that the plaintiff constructed the wall according to the terms of the contract and that the defendant has paid his proportion of the cost of the north sixty feet of the wall. Prior to November 11, 1884, the defendant had not used any portion of the party wall, and on that day he sold and conveyed the center one-third of said lot No. 2 to one David F. Jamison. The deed contained this provision: "Said grantee assumes the agreement between the line owners between the said center third and the west third of said lot."

This action is to recover one-half of the value of the south forty feet of the partition wall erected by the plaintiff.

The question presented for our consideration arises upon the ruling of the trial court in excluding from the jury the testimony offered by the plaintiff tending to prove the said Jamison, the defendant's grantee, erected a building in 1885 upon the center third of said lot and that the same was so constructed as to use and occupy said party wall.

It is urged by counsel for defendant that the court did not err in rejecting the offered testimony, for the reason that Kraft did not obligate himself to pay for the remaining portion of the wall unless he used the same. We think the interpretation of the contract for which the defendant contends should obtain. By the terms of the agreement Kraft promised absolutely to pay one-half the cost of sixty feet of the wall within thirty days after its completion. He only agreed to pay a like proportion of the value of so much of the remaining part of the wall as he should use. If he never joined to the wall he was not to pay. Clearly such is the meaning of the language

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used by the parties. To hold that the defendant is liable because the party wall was used by his grantee would be to interpolate words into the instrument and make a new agreement for the parties, which the court has no power to do. The contract is not merely personal, binding only on the parties to it, but it attaches to and passed with the lot. Jamison had the same right to use the wall as Mr. Kraft, and no more. It was never contemplated by the parties that Kraft alone had the right to join to the wall, but rather that the owner of the lot, whoever he might be, could do so, on paying to the owner of the other lot the unpaid portion of the value of the party wall. This burden Jamison assumed in the deed to him. The judgment is

AFFIRMED.

THE other judges concur.

FIRST NATIONAL BANK OF NORTH BEND V. GEORGE MILTONBERGER.

[FILED JANUARY 27, 1892.]

1. **Pleading: MISJOINDER OF CAUSES: CANNOT BE FIRST RAISED IN SUPREME COURT.** This court will not notice an objection to a petition on the ground that two causes of action are improperly joined, unless such objection was made in the trial court.
2. **Usury: NATIONAL BANKS: SALE OF NOTE BY PAYEE: EVIDENCE.** In an action against a national bank to recover double the amount of interest paid on a usurious contract, defendant contended that it had sold and assigned the usurious note to another bank and that in collecting the face of the note from the maker it was acting merely as the agent of the other bank. *Held*, First, the defendant might evade the penalty for usury by proof of a sale and assignment in good faith of the usurious note; second, the mere assignment of the note by the defendant bank in such case raises no presumption in its own favor of an absolute sale thereof.

33	847
36	667
33	847
41	42
33	847
44	186
33	847
50	778

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3. ———: **PAYMENTS APPLIED ON PRINCIPAL.** In the absence of an agreement or understanding to the contrary, payments on a usurious contract will be applied on the principal debt and not on the usury.
4. **Error Without Prejudice.** A judgment will not be reversed for errors which an examination of the record shows are not prejudicial to the party complaining.
5. ———: **SPECIAL FINDINGS.** Where special findings are requested in the form of questions for the jury, but such questions or findings do not cover the entire case, and the general verdict may stand although the questions may be answered in the way most favorable to the party offering them, it is not error for the court to refuse to submit them to the jury.

ERROR to the district court for Dodge county. Tried below before MARSHALL, J.

D. M. Strong, and *Phelps & Sabin*, for plaintiffs in error, cited, as to misjoinder: *Barnet v. Bank*, 98 U. S., 555; *Natl. Bank v. Dearing*, 91 Id., 29; *Stafford v. Ingersol*, 3 Hill [N. Y.], 38; 1 Hilliard, Torts, 103, and cases; *Alma v. Harris*, 5 Johns. [N. Y.], 175; *Edwards v. Davis*, 16 Id., 281; *Clark v. Brown*, 18 Wend. [N. Y.], 220; *Cornell v. Turnpike Co.*, 25 Id., 367; *Swift v. Dewey*, 20 Neb., 111; *Com'rs v. Bank*, 32 O. St., 200; *Rex v. Robinson*, 2 Burr. [Eng.], 803.

Frick, Dolezal & Stinson, *contra*, cited, as to misjoinder: *King v. Farmer*, 88 N. Car., 22; *Scott v. Robars*, 67 Mo., 289; *Young v. Young*, 81 N. Car., 91; *Lincoln Natl. Bank v. Davis*, 25 Neb., 381. As to the application of payments: *Knox v. Williams*, 24 Neb., 630; *Bank of Cadiz v. Slemmons*, 34 O. St., 142; *Edward v. Rumph*, 3 S. W. Rep. [Ark.], 635; *Dell v. Oppenheimer*, 9 Neb., 457.

POST, J.

This was an action brought in the district court of Dodge county by defendant in error under the provisions of sec-

tions 5197 and 5198 Revised Statutes of the United States, to recover double the amount of usurious interest alleged to have been paid by him on account of a loan from plaintiff in error on the 14th day of November, 1885, also for the conversion of certain notes assigned and delivered by him to the plaintiff in error as collateral security for the loan aforesaid.

The first contention in plaintiff's brief is that the two causes of action cannot be joined under the Code, and that the district court erred in overruling a demurrer to the petition on that ground. A careful inspection of the record discloses the fact that no objection was made to the second amended petition on that ground. It is true a demurrer was interposed to the original petition, which was sustained, and also to the first amended petition, which was overruled. Subsequently, however, plaintiff in error filed its motion to require the plaintiff below to make his said petition more specific, which motion was sustained, and leave given to file an amended petition within thirty days. To this second amended petition plaintiff in error filed a motion for a more specific statement, which was overruled. It then filed its answer without further objection. The district court had jurisdiction of both causes of action and we must presume that plaintiff in error was satisfied to have them joined. This court will not notice alleged errors to which no exception was taken in the trial court. (*Pettit v. Black*, 13 Neb., 142; *Dutcher v. State*, 16 Id., 30; *Warrick v. Rounds*, 17 Id., 411.)

The plaintiff in error requested the following instruction: "The jury are instructed that when the transfer of a negotiable promissory note in the usual course of business for a valuable consideration is proved, the law presumes that such transfer was for a lawful purpose, and such presumption cannot be overcome without positive and clear evidence," which request was refused, and of that ruling it now complains. In this connection it should be

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noted that there had been several successive renewals of the note given for the original loan prior to September 14, 1886, on which day the last note for \$677.65 was executed, and maturing in sixty days. This note was amply secured by collateral notes, which matured about the time of the principal note. A day or two previous to the maturity of the \$677.65 note plaintiff in error assigned and delivered it to the First National Bank of Schuyler, by which it was immediately returned to plaintiff in error at North Bend for collection, and a sufficient amount of the proceeds of the collaterals applied to pay and satisfy it, which was done January 12, 1887. The contention of plaintiff in error was that it had in good faith sold the note in question, and that in making the collection it was acting merely as the agent of the First National Bank of Schuyler. The contention of defendant in error was that the assignment to the First National Bank of Schuyler was not in fact a sale in good faith, but a mere shift in order to evade the penalty for usury.

The trial court, upon refusing the request of plaintiff in error, instructed the jury to the effect that the burden was upon the defendant below to prove that the sale and transfer of the note in question was in good faith, and that said note was, at the time of payment thereof, the property of the First National Bank of Schuyler. On this branch of the case the only question was the ownership of the note, since the proof of usury is clear; in fact, it is not seriously controverted. Had the Schuyler bank been the plaintiff seeking to recover on the note, a different question would have been presented. In that case the presumption of good faith would have been available in its favor until proof of usury, but no longer. (*Lincoln National Bank v. Davis*, 25 Neb., 381.) The trial court, in the instruction given, clearly recognized the right of plaintiff in error to evade the penalty of usury by selling and disposing of the note in good faith. It also held, and rightly, we think, that

the presumption of ownership in favor of the indorsee of negotiable paper did not apply to plaintiff in error. In other words, that the bare indorsement of a note in the usual course of business by a national bank raises no presumption in its own favor as against the maker thereof from whom it has collected usurious interest, but that ownership in a third party at the time it demanded and received payment must, like other defenses, be proved by the bank. There was, therefore, no error in the refusing of the instruction asked by plaintiff in error, and the giving of the one on the same subject by the court.

The district court, on its own motion, gave the following instruction: "You are instructed, as a matter of law, that payments made, generally, upon a usurious loan are not to be taken as payments upon the usury of the loan, so that if you should find from the evidence and under the instructions given you that payments were made on the loan to defendant generally, and that said loan was usurious, then and in such an event you cannot consider such payments as payments of the usury alone, unless you further find from the evidence that plaintiff expressly agreed or assented that such payments were to be payments of the usury." Plaintiff in error requested an instruction to the effect that payment, in the absence of any understanding or direction to the contrary, will be presumed to be a payment, first, of the interest, and the balance, if any, to be applied upon the principal debt. To the giving of the one and the refusal of the other plaintiff in error now complains. The instruction given correctly states the law, and there is no error in the ruling complained of. (*Knox v. Williams*, 24 Neb., 630.)

Complaint is made of the refusal to give the following instruction: "If the jury find that a witness has deliberately sworn falsely as to any material fact in the case, it is the right of the jury to disregard all the statements of such witness, except such statements are corroborated by other good and respectable witnesses." The refusal to give this

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instruction is, at most, error without prejudice. While it is true there was a conflict between the witnesses, it appears that the jury must have credited the witnesses for the plaintiff below. From a careful reading of the entire bill of exceptions we are unable to point out any witness to whose testimony the rule announced in the instruction should be applied in view of the finding of the jury.

Plaintiff in error requested the court to submit to the jury certain special findings, which request was refused. In *Floaten v. Ferrell*, 24 Neb., 347, it was held to be within the discretion of the trial court to submit or refuse special findings. The findings, seven in number, were properly refused. Section 292 of the Code provides that a special verdict must present the facts as established by the evidence, and not the evidence to prove them, and they must be so presented as that nothing remains to the court but to draw from them conclusions of law. If the jury had, in response to the several questions, given the most favorable answers of which they were susceptible, in favor of the plaintiff in error, still they would in no sense have been decisive of the case. The general verdict might still have been sustained. There was no error in the refusal of the court to submit them.

Finally, it was alleged that the court erred in allowing one of the witnesses for the plaintiff below to testify to the amount due on a certain note. There seems to be no doubt that the calculation of the witness was correct, and that the jury should have calculated it in the same manner and with the same result. Plaintiff in error cannot complain of a ruling which is not prejudicial. The judgment is

AFFIRMED.

THE other judges concur.

WILLIAM J. YATES, APPELLANT, v. MARTIN E. KINNEY ET AL., APPELLEES.

[FILED JANUARY 27, 1892.]

1. **Judgments: INJUNCTION: AGREEMENT**, by virtue of which a judgment of the district court is sought to be perpetually enjoined, construed, and *held*, not to include settlement or satisfaction of the judgment in controversy.
2. ———: **ASSIGNEE TAKES SUBJECT TO ATTORNEY'S LIEN**. The assignee of a judgment takes it subject to the rights of an attorney who has filed a lien in due form for services rendered in procuring such judgment.

APPEAL from the district court for Fillmore county.
Heard below before MORRIS, J.

F. B. Donisthorpe, for appellant, cited: *Johnson v. Boice*, 4 S. Rep. [La.], 163; *Wardell v. Eden*, 2 Johns. Cas. [N. Y.], 258; *Oliver v. Sheeley*, 11 Neb., 522; *Little v. Giles*, 27 Id., 179.

Maule & Sloan, contra.

POST, J.

Prior to the 14th day of October, 1884, the defendant Kinney was in possession of the north half of section 30, township 6, range 2, in Fillmore county, as tenant of the plaintiff. During all of the time between the date named above and the 16th day of May, 1888, said parties were engaged in litigation with each other. It is necessary to make mention in this connection of some of their contentions, for reasons which will hereafter appear. First, plaintiff filed his bill in equity to restrain defendant Kinney from removing certain corn from the premises named. This case terminated in a judgment for the defendant in the district court, which was affirmed on appeal

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by this court. (19 Neb., 275.) During the pendency of that action the defendant Kinney removed a portion of the corn in controversy, for which he was arrested on the charge of larceny on the complaint of plaintiff. On a hearing on said charge he was discharged. He thereupon commenced an action against plaintiff for malicious prosecution, and recovered judgment in said action for \$200. Plaintiff filed his petition in error in this court for the purpose of having said judgment reviewed, and at the December, 1888, term it was affirmed. (25 Neb., 120.)

On June 12, 1886, J. P. Maule filed an attorney's lien against said judgment for \$100 on account of services rendered in said case, and on the 15th day of December, 1888, he filed an additional lien for \$136.35, and on the 17th day of the same month the defendant Rushton filed a lien for \$45 for services as an attorney in the same case. On the 16th day of May, 1888, the plaintiff and said Kinney entered into a written agreement, of which the following is a copy:

"To whom it may concern: Know ye, that in consideration of the sum of \$60 paid unto Martin E. Kinney by William J. Yates, both of Fillmore county and state of Nebraska, the receipt whereof is hereby acknowledged, that all differences as existing, and all claims as from one against the other of said parties, are hereby settled in full, as pertaining to the taking of certain corn by William J. Yates belonging to said Martin E. Kinney some time during the close of the year 1884 and the commencement of the year 1885, and this is in settlement in full of all matters arising out of the same.

"Dated this 16th day of May, A. D. 1888.

"MARTIN E. KINNEY.

WILLIAM J. YATES.

"Witness:

"F. B. DONISTHORPE.

"W. C. SLOAN."

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On the 21st day of December, 1888, the defendant Geo. D. Noble filed in the office of the clerk of the district court of Fillmore county a paper purporting to be an assignment of said judgment by Kinney to himself dated August 4, 1887. And on the 7th day of May, 1889, the defendants Rushton and Sloan, as attorneys for said Noble, caused an execution to be issued to satisfy said judgment, and placed in the hands of the defendant Carson, as sheriff of said county, who by virtue thereof levied upon certain property of the plaintiff. Plaintiff by this action seeks to have defendant restrained from collecting the judgment aforesaid. He also alleges that he is the owner of certain real estate in said county on which said judgment is an apparent lien, and asks to have it declared to be paid and satisfied. He joins as defendants the said Martin E. Kinney, Geo. D. Noble, J. H. Rushton, Chas. H. Sloan, and W. I. Carson, sheriff. In his petition he charges that on the 16th day of May, 1888, he and the said Kinney entered into a written agreement by which, in consideration of \$60 paid by him to said Kinney, they settled and adjusted all differences between them and all claims one against the other, including the action for malicious prosecution, which was at said time pending and undetermined in this court. He further charges that at the time he made said settlement with Kinney he had no notice that the defendant Rushton made any claim to a lien on the judgment against him. He further alleges, and which is not denied, that on the 17th day of December, 1888, in consideration of \$100 paid him, said J. P. Maule released and satisfied of record both of the liens claimed by him. Kinney filed his separate answer, in which he practically confesses the bill of plaintiff. Since he denies the assignment of the judgment to Noble and disclaims any interest in the subject of the suit. He also says "that his understanding was long ago that this matter pertaining to said case was settled." The other defendants join in an answer

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in which they specifically deny that the action for malicious prosecution was settled by the plaintiff and said Kinney, and allege that on the 4th day of August, 1887, said Kinney sold and assigned said judgment to the defendant Noble, of which plaintiff had notice, and that defendant Rushton has an attorney's lien on said judgment amounting to \$45.

On the hearing before the district court plaintiff introduced the foregoing written agreement signed by himself and Martin E. Kinney, and testified in his own behalf that at the time of the alleged settlement he had no knowledge of the claim of Rushton against the said judgment, and rested. The assignment of the judgment by Kinney to Noble is clearly established by the uncontradicted testimony of the latter, hence the only material question in controversy is the alleged settlement. It requires no argument to sustain the proposition that Noble has the right to enforce collection of the judgment, unless that matter was included in the settlement between plaintiff and Kinney and the consideration thereof, \$60, paid without notice of the assignment. Plaintiff evidently assumed that the written agreement should be construed to include the suit for malicious prosecution and the judgment against him in said action. The agreement in question will not bear such a construction. The latter part of the contract evidently limits its application to claims for the taking of certain corn by plaintiff belonging to said Kinney. There being a failure of proof upon the material issue, plaintiff is not entitled to have the judgment enjoined.

There remains one question which is presented by the pleadings. Maule's first lien for \$100, it is admitted, was duly filed and notice thereof given long previous to the assignment of the judgment to Noble. Plaintiff was therefore bound to pay and satisfy said lien, notwithstanding the assignment of the judgment to Noble, and he should accordingly be credited with the \$100 paid in satis-

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faction thereof. (*Aspinwall v. Sabin*, 22 Neb., 77.) With this modification the decree of the district court will be

AFFIRMED.

THE other judges concur.

THE OVERTON BRIDGE COMPANY, APPELLANT, v.
JOHN L. MEANS ET AL., APPELLEES.

[FILED JANUARY 27, 1892.]

Public Corporations: ENFORCEMENT OF JUDGMENTS AGAINST.

Property of a public corporation, such as a bridge company, which is essential to the exercise of its franchise and the discharge of the duties it has assumed toward the general public, cannot, in the absence of statutory authority, be seized and sold to satisfy an ordinary judgment. The only remedy of creditors in such case is to obtain the appointment of a receiver and a sequestration of the company's earnings.

APPEAL from the district court for Dawson county.
Heard below before HAMER, J.

C. W. McNamar, for appellant:

There is no statutory provision in this state for the sale of a highway or bridge; and if it is the property of a corporation to the extent of having the mere right of tolls, that would not make it salable. (*Seymour v. M. & T. Co.*, 10 O., 476, 480.)

O. A. Abbott, contra:

Property essential to corporate franchises was formerly inalienable because all corporations were created directly by the legislature, thus being recognized as public, while

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a special trust was reposed in the corporators. A different system of incorporation prevails in this state, and the old rule as to alienation should cease with the reason therefor. Except in the case of competing railway lines, our statutes impose no restrictions on the sale of corporate property. Even if the property cannot be sold under a common law execution, it can be disposed of by court of equity. Appellant's citations are not in point.

Post, J.

The plaintiff, The Overton Bridge Company, is a corporation organized for the purpose of constructing and maintaining a toll bridge over the Platte river near the village of Overton, in Dawson county. In the fall of 1886 it entered into a contract with the defendant Means, in pursuance of which the latter erected the bridge in controversy, on the range line between the ranges 19 and 20. Soon after the completion of said bridge the proper authorities of Dawson and Phelps counties opened a road along said range line and over said bridge, and said bridge has been used by the public ever since as a highway. For the purpose of assisting in the building of said bridge, Overton precinct, in Dawson county, voted to issue the bonds of said precinct in the sum of \$6,000. Said bonds were subsequently issued and delivered to the plaintiff company, and by it turned over to defendant Means in part payment of the amount due under his contract. There being a further sum due on said contract, defendant brought suit in the district court of Dawson county, and on the 26th day of April, 1888, recovered judgment against the plaintiff company for \$2,681 and costs. Afterward an execution was issued and placed in the hands of the defendant Taylor, as sheriff of Dawson county, who levied upon the bridge in controversy as real estate to satisfy said execution, said company having no other property. The plaintiff thereupon filed its petition in the district court of Dawson county, by which it seeks

to have defendant perpetually enjoined from selling said bridge to satisfy the aforesaid judgment. On final hearing, the district court entered a decree enjoining the sale of the bridge on said execution, but ordered the defendant Taylor, as a special master, to sell said bridge and all the rights of the plaintiff company to maintain the same, including its franchise, for the purpose of satisfying the judgment aforesaid. From that decree plaintiff has appealed to this court.

We have not been referred to any provision of statute which will authorize the seizure and sale of the bridge in controversy to satisfy an ordinary judgment at law, either upon execution or decree of a court of chancery. If the decree of the district court can be upheld it must be, therefore, by an application of the principles of the common law. We have, in our investigation of the question involved, found no case the doctrine of which sustains the contention of defendant. On the other hand, we believe the rule deducible from all the cases may be safely stated as follows:

The property of strictly private corporations, such, for instance, as manufacturing, mining, and trading companies, and perhaps those in which the public is indirectly interested, as libraries, hospitals and the like, is liable to be taken on execution precisely as the property of an individual debtor, but the property of corporations which are classed as public agencies, such as railroad and bridge companies, which is essential to the exercise of their corporate franchise, and the discharge of the duties they have assumed toward the general public, cannot, without statutory authority, be sold to satisfy a common law judgment, either on execution or in pursuance of an order or decree of court. (*Gooch v. McGee*, 83 N. Car., 59; *Baxter v. Turnpike Co.*, 10 Lea [Tenn.], 488; *Louisville W. Co. v. Hamilton*, 81 Ky., 517; *Palestine v. Barnes*, 50 Tex., 538; *Gue v. Tidewater Canal Co.*, 24 How. [U. S.], 257; *Seymour v. Milford*

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& *C. Turnpike Co.*, 10 O., 476; *Foster v. Fowler*, 60 Pa. St., 27.)

It is said by Morawetz in his work on Private Corporations, section 1125: "If a corporation has received aid from the government for a public purpose, any property of the company necessary to enable it to accomplish this purpose is impressed with a trust in favor of the public and cannot be seized and sold by the creditors of the company under execution. Property acquired by the company by purchase, if not necessary to enable it to perform its duties to the public, may be taken under an attachment or execution; but after exhausting this class of property the only remedy of a judgment creditor is to obtain the appointment of a receiver and a sequestration of the company's earnings."

The privileges conferred by law upon corporations to construct railroads, canals, bridges, etc., are conferred with a view to the use and accommodation of the public, and to permit the property necessary for the accommodation of the public to be taken and sold by creditors would be to defeat the prime object of the statute which endows such companies with corporate existence. The bridge in this case was, on its completion, dedicated to the use of the public as was intended from the first, and has continued to be, and is now, a part of the public highway of the state; and it is not the policy of the law to permit it to be diverted from such use.

The judgment is reversed and the cause remanded to the district court with directions to enter a decree in accordance with the prayer of the petition.

REVERSED AND REMANDED.

THE other judges concur.

JOHN BALLARD ET AL. V. OLEF HANSEN.

38 861
190 734

[FILED FEBRUARY 17, 1892.]

1. **Adverse Possession: EVIDENCE.** Upon the evidence presented in the record, *held*, that the title of the plaintiff by adverse possession was clearly established.
2. ———: **INSTRUCTIONS** examined, and *held*, not prejudicial to the defendant below.
3. ———: **THE WORD "HOSTILE,"** when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill-will, or that he is an enemy of the person holding the legal title, but means an occupant who holds, and is in possession, as owner, and therefore against all other claimants of the land.
4. ———: **NOT INTERRUPTED BY TRESPASS.** A stranger who neither has nor claims an interest in the land, or the possession thereof, cannot, by a mere trespass or surreptitious entry, interrupt the running of the statute in favor of the actual occupant.
5. ———: **INSTRUCTIONS** asked by the defendant, even when modified, were prejudiced to the plaintiff below and not to the defendant below.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Congdon & Hunt, for plaintiffs in error, cited: *Edmonston v. Shelton*, 4 Jones [N. Car.], 451; *Baldwin v. Buffalo*, 35 N. Y., 375; *Cook v. Babcock*, 11 Cush. [Mass], 209; *Riley v. Jameson*, 3 N. H., 26; *Lund v. Norcross*, Id., 50; *Jackson v. Sharp*, 9 Johns. [N. Y.], 167; *Bates v. Norcross*, 14 Pick. [Mass.], 228; *Kirk v. Smith*, 9 Wheat. [U. S.], 241*; *Russell v. Davis*, 38 Conn., 562; *Unger v. Mooney*, 63 Cal., 586; *Armstrong v. Morrill*, 14 Wall. [U. S.], 120; *Groft v. Weakland*, 34 Pa. St., 308; *Angel, Limitations* [2d Ed.], 447; *Little v. Downing*, 37 N. H., 367.

Lake & Hamilton, contra, cited: *Stettinische v. Lamb*, 18 Neb., 619; *Clark v. Potter*, 32 O. St., 49; *Donovan v. Bissell*, 53 Mich., 462; *De La Vega v. Butler*, 47 Tex., 529; *Hughes v. Pickering*, 14 Pa. St., 297; *Harper v. Topley*, 35 Miss., 506; *Crispen v. Hannavan*, 50 Mo., 536; *Duren v. Sinclair*, 22 S. Car., 361; *Hardy v. Riddle*, 24 Neb., 673.

MAXWELL, CH. J.

This action was brought by the defendant in error against the plaintiff in error in the district court of Douglas county, to recover the possession of blocks 231, 234, and 238, composing twenty-four lots, in the city of Florence. Hansen's claim to nearly all the lots is based upon adverse possession. The plaintiff in error disclaimed title to nine and a half of the lots. On the trial of the cause the jury returned a verdict in favor of Hansen for "lots 1, 2, 3, 4, 6, 7, and 8 in block 231, lots 1, 2, 3, 4, 5, 7, and 8 and the undivided half of lot 6 in block 234, and lots 1, 2, 3, 4, 5, 6, 7, and 8 in block 238, and found for the defendant below as to the residue, viz., lot 5 in block 231 and the undivided half of lot 6 in block 234; and a motion for a new trial having been overruled, judgment was entered on the verdict."

It is claimed on behalf of the plaintiff in error that the verdict is not sustained by sufficient evidence. We think differently, however. The verdict seems to be based upon and is fully sustained by the evidence.

Objections are made to certain instructions, which will be considered together. The instructions of the court were as follows: "This is an action in ejectment brought by the plaintiff to recover from the defendants the possession of blocks numbered 231, 234, and 238, in the city of Florence, Douglas county, Nebraska, and damages for the alleged wrongful detention thereof. The plaintiff, in his

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petition, claims to have a legal estate in the premises in controversy, and to be entitled to the possession thereof; that the defendants, since the 17th day of February, 1888, have unlawfully kept, and still keep, the plaintiff out of possession, to his damage in the sum of \$1,000. Judgment is prayed for possession of the premises and damages in the said sum of \$1,000.

"2. The defendants, by their answer, each make general denial of the allegations of the plaintiff's petition except that the defendant, the Florence Land & Trust Company, is a corporation organized under the laws of Nebraska, which they admit.

"3. It is admitted by the parties that the land in controversy was patented by the United States and by the patentee sold to the 'Old Florence Land Company,' and by it surveyed and platted, and that each block is subdivided into eight lots, numbered from 1 to 8, inclusive.

"4. The defendants disclaim title or the right of possession to the following lots: Lot 3 in block 231, lots 1, 4, 7, and 8 and undivided half of lot 6 in block 234, lots 2, 4, 5, and 7 in block 238, and conceded the claim of plaintiff in regard thereto. You should therefore find for the plaintiff as to those lots.

"5. The plaintiff disclaims as to lot 5 in block 231 and the undivided half of lot 6 in block 234. As to these you should find for the defendants.

"6. The lots remaining in controversy are as follows: 1, 2, 4, 6, 7, and 8 in block 231, 2, 3, 5, and 6 in block 234, 1, 3, 6, and 8 in block 238. The rights of the parties thereto you are to determine from the evidence under the instructions of the court.

"7. The plaintiff does not claim to have perfect title by deed to the lots in controversy, but bases his claim on color of title—that is, deeds which purport to convey the same to him, but which are either void on their face or else are not shown to have been executed by parties who had title

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to the property described in them for the full statutory period, as will be hereafter described to you.

"8. The jury are instructed that the defendant has shown such title in itself, or in other parties as will entitle it to the possession of the lots in controversy as specified in instruction 6, unless you find, under instructions hereafter given, that the plaintiff has shown in himself a title by adverse possession.

"9. The jury are further instructed that adverse possession, as relied upon by the plaintiffs in this action, is the open, actual, exclusive, notorious, and hostile occupancy of land, and claim of right, with the intention to hold it as against the true owner and all other parties, such occupancy, if continuous for the period of ten years, ripens into a perfect title, after which it is immaterial whether the possession be continued or not.

"10. By open and notorious possession is meant such an occupancy as would indicate to a stranger or passer-by that some one was claiming the premises. It would be evidenced by acts of ownership or control, such as making improvements thereon, cultivating the ground, leasing it to others. If you find and believe from a preponderance of the testimony in this case that the plaintiff, either by himself or in connection with his grantors from whom he procured deeds, giving color of title as heretofore explained, was in the actual, open, notorious, exclusive, continuous possession of any of the lots in controversy for the period of ten years, claiming to own them and to hold them as against all others, then as to such lots you are instructed the plaintiff acquired perfect title by adverse possession, and as to such lots he is entitled to recover in this action.

"11. The jury are instructed that if they believe from the testimony that at the time of the entry of the plaintiff, or any of his grantors, into the possession of any of the lots in controversy, that such entry and occupancy lacked the element of hostility of the rights of the true owner,

and that such occupant did not, at the time of taking possession of the same, claim to own it, or to hold it as against the rightful owner, then in that event it is your province to inquire and determine from the evidence at what time, if at all, such occupancy becomes hostile—that is, at what time the occupant first did claim to hold the same as his own; and if you shall find that any of the lots in suit were not so held in hostility to the title of the true owner and all others for the full period of ten years prior to the 17th day of February, 1888, then as to such lots you should find for the defendant.

“12. It is the province of the jury to decide as to the weight of testimony and the credibility of the witnesses. You should consider carefully the testimony of the several witnesses and harmonize the whole evidence, so far as it can be done, but where there is a conflict of testimony that cannot be reconciled, it is for you to say who are the more worthy of belief. In making up your minds in this regard you should take into account the appearance of the witnesses while on the stand, the interest, bias, or prejudice they may show, their opportunity of knowledge as to the things concerning which they testify, and from the whole testimony make up your minds as to what your verdict shall be.

“13. If the jury shall find for the plaintiff as to any of the lots in controversy mentioned in instruction 6, then you should inquire and determine from the testimony and allow him such damages as he had sustained by the wrongful detention thereof.”

The word “hostile,” which Webster defines as “belonging to an enemy; appropriate to an enemy; showing ill-will and malevolence, or a desire to thwart and injure; occupied by an enemy or a hostile people; inimical; unfriendly; as, a hostile force; hostile intentions; a hostile country; hostile to a sudden change” (Ed. of 1881, p. 640), does not correctly state the character of the occupancy

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necessary to create adverse possession. There need be no ill-will, malevolence, or desire to injure any one, and the element of hostility in that sense does not necessarily enter into the case. What was meant, no doubt, was that the possession of the plaintiff below must be adverse or against the party holding the legal title. In this sense no doubt it may be sustained. The word seems to have come into use in this connection at a time when the statute of limitations was looked upon with disfavor, and the courts disposed, if possible, to defeat all claims of the adverse occupant. At the present time the statute is viewed with favor as one of repose. In most instances it will be found that the adverse occupant has entered under a claim of right, and where such occupation has been adverse, open, notorious, and exclusive for the statutory period, that is sufficient. The word "hostile," therefore, does not correctly express the character of the occupancy required, but as this was against the plaintiff below, the defendant below cannot complain on that ground. These instructions, except in the matter referred to, seem to state the law correctly, and to most of them no objections were made. A number of instructions were given at the request of the plaintiff which need not be noticed.

The defendant below asked instructions as follows:

"You are further instructed that if you find from the evidence that the inclosure around the property in controversy, or any of it, was removed or destroyed or allowed to go to ruin, and the premises in controversy, or any portion of them, were not cultivated by any one or occupied during the time such fence was destroyed or removed, and you believe them to have been abandoned, then the possession of the holder of the legal title was restored by operation of law, and the statute of limitation would only begin to run thereafter from the time such premises were inclosed or cultivated or occupied again; and if you find such condition of any of the premises to have existed

within ten years prior to the commencement of this suit, you must, as to such lot or lots, find for the defendants. Adverse possession must be shown by clear and positive proof, and unless you find from the evidence that the plaintiff or the parties through whom he claims were in the adverse possession, as previously described, of the property in controversy for the full period of ten years, without interruption or intrusion by third parties (under a claim of right) or abandonment, you should find for the defendant.

"12. If you find from the evidence that at any time within a period of ten years prior to the commencement of this suit any party or parties entered upon the possession of the property in controversy, or any portion of it, without let or hindrance from the plaintiff or those through whom he claims, and while so in possession used and occupied the premises or any portion of them as their own, and not as the tenant of the plaintiff or those through whom he claims, ('provided the plaintiff or his grantor last in possession prior thereto knew of such occupancy, and it is not shown that they objected thereto') then such possession and occupancy were an interruption of the running of the statute, and the plaintiff or those through whom he claims would, as to such property, have to renew their adverse occupancy of the same, and continue such occupancy for the statutory period of ten years; and if you find that there was such an interruption, and the possession of the plaintiff or those through whom he claims has not continued for the statutory period since such interruption, then, as to such lot or lots, the possession of which was so interrupted, you must find for the defendant." The modification was as follows: "Given as modified by the addition of the words 'provided the plaintiff or his grantor last in possession prior thereto knew of such occupancy, and it is not shown that they objected thereto.'"

The mere intrusion of a trespasser is not an interrup-

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tion. (*Bell v. Denson*, 56 Ala., 444; *Rayner v. Lee*, 20 Mich., 384; *Stettinische v. Lamb*, 18 Neb., 619; *Hughes v. Pickering*, 14 Pa. St., 297; *Hudgins v. Crow*, 32 Ga., 367; *Fugate v. Pierce*, 49 Mo., 441; *Crispin v. Hannavan*, 50 Id., 536; *De La Vega v. Butler*, 47 Tex., 529; *Harper v. Tapley*, 35 Miss., 506; Am. & Eng. Ency. of Law, 274.)

In *Haywood v. Thomas*, 17 Neb., 238: A portion of the fence around the inclosure was destroyed by fire, but was soon afterwards restored, and it was held no interruption. We do not understand that a mere stranger having no interest in the premises, and claiming none, can interrupt the running of the statute; certainly he would not do so stealthily by night, as it were, and claim that thereby he had defeated the plaintiff. The instruction, even as modified, was against the plaintiff below, and the defendant below has no cause of complaint on that ground. There is no error of which the plaintiff in error can complain, and the judgment is

AFFIRMED.

THE other judges concur.

33	868
57	217

McCord, Brady & Co., APPELLEES, v. JACOB WEIL,
JR., ET AL., APPELLANTS.

[FILED FEBRUARY 17, 1892.]

1. **RECEIVERS: RIGHTS OF MORTGAGEES AND EXECUTION CREDITORS.** An insolvent debtor executed two or more chattel mortgages upon all his property to secure debts of the mortgagees and a debt of a third party. The mortgagees took immediate possession, whereupon a judgment creditor, in whose favor an execution had been returned unsatisfied, applied for a receiver. The district court, upon the proofs before it, having appointed such receiver, *held*, no error.

2. ———: FINAL ORDER: AN ORDER APPOINTING a receiver is a final order which may be reviewed in advance of the main case, overruling *McCord v. Well*, 29 Neb., 682.

REHEARING of case reported 29 Neb., 682.

Chas. A. Goss, and *Churchill & Carr*, for appellants, cited: *Feder v. Solomon*, 26 Neb., 266; *Dwight v. Overton*, 35 Tex., 390; *Briggs v. Davis*, 20 N. Y., 15; 2 Blacks. Com., 326; *Leitch v. Hollister*, 4 N. Y., 211; *Chicago Lum. Co. v. Fisher*, 18 Neb., 334; *Loeb v. Milner*, 21 Id., 392; *Knox v. Williams*, 24 Id., 630; *Studebaker Mfg. Co. v. McCargur*, 20 Id., 501; *Fuller v. Schroeder*, Id., 631; *Newlean v. Olson*, 22 Id., 717; *Lining v. Heron*, 23 Id., 197; *Hoffmann v. Mackall*, 5 O. St., 124; *Mfg. Bank v. Bank of Pa.*, 7 W. & S. [Pa.], 335; *Hewitt v. Huling*, 11 Pa. St., 27; *McBroon & Woods' Appeal*, 44 Id., 92; *Claylin v. Maglaughlin*, 65 Id., 492; *Nelson v. Gary*, 15 Neb., 532; *Burrill*, Assignments, sec. 167; *Lining v. Raymond*, 12 Neb., 25; *Hamilton v. Lau*, 24 Id., 64; *Rothell v. Grimes*, 22 Id., 526; *Leffel v. Schermershorn*, 13 Id., 342; *Shelly v. Heater*, 17 Neb., 505; *Elwood v. May Bros.*, 24 Id., 373; *Grimes v. Farrington*, 19 Id., 45; *Davis v. Scott*, 22 Id., 157; *Cowles v. Rickets*, 1 Ia., 585; *Bonns v. Carter*, 20 Neb., 566; *Harkrader v. Leiby*, 4 O. St., 602; *Dickson v. Rawson*, 5 Id., 218; *Page v. Smith*, 24 Wis., 368; *Norton v. Kearney*, 10 Id., 386; *Ray v. Gore*, 41 N. W. Rep. [Mich.], 329; *Kohn Bros. v. Clement*, 58 Ia., 589; *Farwell v. Jones*, 63 Id., 316; *Gage v. Perry*, 29 N. W. Rep. [Ia.], 822; *Van Paten v. Burr*, 52 Ia., 518; *Sargeant v. Watts*, 22 N. W. Rep. [Wis.], 131; *Scott v. McDaniel*, 3 S. W. Rep. [Tex.], 291; *Gilbert v. McCorkle*, 11 N. E. Rep. [Ind.], 296; *Aulman v. Aulman*, 32 N. W. Rep. [Ia.], 240.

Montgomery & Jeffrey, contra, cited: *Winner v. Hoyt*, 28 N. W. Rep. [Wis.], 380; *Woonsocket Rubber Co. v. Falley*, 30 Fed. Rep. [Ind.], 808.

MAXWELL, CH. J.

This case was before this court in 1890 and was dismissed for want of a final order from which to appeal. A rehearing was granted, and after a careful review of the authorities we are of the opinion that an order appointing a receiver is a final order which may be reviewed in advance of the main case. This action is a creditor's bill brought by the plaintiffs against the defendants. The defendants answered separately. Afterwards the plaintiff, by leave of court, filed an amended petition and the original answers were permitted to remain on file as answers to the amended petition. In the amended petition the plaintiff prays for a receiver. The application was based upon affidavits and other evidence, and the court thereupon made an order appointing a receiver and in other respects as follows:

"On the 11th day of February, 1889, this cause came on for hearing upon the petition of plaintiffs, praying for an order, enjoining the defendants and each of them, as prayed in said petition, and for the appointment of a receiver to take charge of and sell the goods, wares, and merchandise and other personal property belonging to the defendant Jacob Weil, Jr., hereinafter described; upon consideration whereof, and of the affidavits of both parties filed herein, the court finds that the plaintiffs are entitled to an injunction and the appointment of a receiver, as prayed in said petition.

"It is therefore ordered that the defendants, and each of them, and all other parties claiming by or through them, or each of them be, and are hereby, enjoined from selling and disposing of the stock of goods, wares, and merchandise belonging to the defendant Jacob Weil, Jr., and consisting of staple and fancy groceries, canned goods, cigars and tobaccos, flour, fruits, vegetables, glassware, woodenware, and crockery, and all articles of merchandise kept

and owned by the defendant Jacob Weil, Jr., in the store-room and basement No. 1002 Saunders street, city of Omaha, Nebraska; also all store fixtures, furniture, show cases, scales, lamps, stoves, office desks, etc., counters and shelving, ice chest, oil and gasoline tanks, coffee mills and all other fixtures, etc., used in said store-building and basement and owned by the said defendant Jacob Weil, Jr.; also one white horse about nine years of age, named Charlie; one sorrel horse, about nine years of age, named Red; and one brown pony, about nine years of age, named Billy; also one double-decked delivery wagon, one single seat buckboard wagon, one set double harness, and one set single buggy harness, four horse blankets, one oil tarpaulin for wagon, and two hitching weights.

"It is further ordered, unless the defendants execute and deliver to the plaintiffs a bond with good and sufficient securities, conditioned that said defendants will pay or cause to be paid the judgment in favor of the plaintiffs, and against the defendant Jacob Weil, Jr., as set out in plaintiffs' petition, together with all the costs of this action in case the same shall finally be decided in favor of said plaintiffs, that Edgar Zabriskie be appointed receiver of said goods, wares, and merchandise, and of all the property heretofore described, and the sheriff is hereby directed to deliver the same to said receiver in case he is appointed as aforesaid, who is authorized and required, without unnecessary delay, to sell and convert into money said property in such manner as in his judgment will be to the best interest of all parties concerned, either by advertisement and a public sale thereof, or at private sale as in the ordinary course of business, and to turn said money into court.

"It is further ordered that before said receiver enters upon his duties in case said defendants fail to give the bond aforesaid he shall, as well as the plaintiffs herein, execute and deliver to the clerk of this court their undertaking, with Lewis S. Reed and Henry W. Yates as their sureties,

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to the defendants in the sum of \$3,700, conditioned according to law.

"It is further ordered that said receiver make a report of his doings in this behalf. The defendants having elected not to give a bond to the plaintiffs as above provided, the said Edgar Zabriskie is hereby appointed receiver subject to the conditions and with the powers as above set forth."

The question before the court is this, Was the district court justified in appointing a receiver? The plaintiffs in their petition set forth the indebtedness of Jacob Weil, Jr., to them, the recovery of a judgment, and the issuing and return of an execution unsatisfied. They also allege that certain transfers and conveyances of property by said Weil to his mother and others were fraudulent, and for the purpose of defrauding creditors. There is considerable testimony in the record tending to sustain this contention. Mrs. Weil, the mother of Jacob Weil, Jr., claims the property. The bill of sale is as follows:

"Know all men by these presents, that I, Jacob Weil, Jr., of the county of Douglas, and state of Nebraska, in consideration of \$3,500, in hand paid by Caroline Weil, of Cleveland, Ohio, the receipt whereof is hereby acknowledged, do hereby sell and convey unto the said Caroline Weil the following goods and chattels, situate in the county of Douglas, state of Nebraska, to-wit:

"All and singular my stock of goods, wares, and merchandise, consisting of staple and fancy groceries, canned goods, cigars and tobaccos, flour, fruits and vegetables, glassware, woodenware and crockery, in fact all articles of merchandise kept and owned by me, situate in store-room and basement number 1002 Saunders street, city of Omaha, Nebraska; also all store fixtures, furniture, show cases, scales, lamps, stoves, office desk and safe, counters and shelving, ice chest, oil and gasoline tanks, coffee mill and other fixtures, furniture, etc., now used in said store-room and basement and owned by me; also hereby sell, assign,

set over unto said Caroline Weil, her heirs and assigns, all books of account and bills receivable, the same being upon the books in said business in said store-room, as fully and completely as though each account and bill receivable was by itself separately assigned; also one white horse, about nine years of age, named 'Charlie'; one sorrel horse, about nine years of age, named 'Red,' and one brown pony, about nine years of age, named 'Billy'; also, one double-decked delivery wagon, one single-seat buckboard wagon, one set double harness, and one set single buggy harness, four horse blankets, one oil tarpaulin for wagon, and two hitching weights.

"And I hereby covenant and agree to and with the said Caroline Weil, her heirs and assigns, that the above described chattels, goods, wares, and merchandise, and the said book accounts and bills receivable are now in my possession, are owned by me and are free from all incumbrance in all respects.

"To have and to hold the same forever, and I, the said Jacob Weil, Jr., will forever warrant and defend the same against all persons whomsoever, upon condition, however, that if the said Jacob Weil, Jr., shall pay to the said Caroline Weil, her heirs and assigns, his promissory notes described as follows, to-wit: One note dated on or about January 1, 1887, for \$2,000, payable one year after date thereof, and one note of \$1,000, dated along in March or April, 1887, due one year from date thereof, both of which notes are payable to Caroline Weil; also one note dated about October 1, 1888, payable one year from date thereof, with interest thereon, payable to Meyer Weil, with interest on all of said notes at the rate of — per cent per annum from date thereof until paid, according to the tenor thereof, then these presents to be void, otherwise in full force.

"And I, said Jacob Weil, Jr., do hereby covenant and agree to and with the said Caroline Weil, that in case of default made in the payment of the above mentioned prom-

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issory notes, or in case of my attempting to dispose of or remove the same from Douglas county, Nebraska, the aforesaid goods, chattels, wares, merchandise, fixtures, furniture, books of account, or bills receivable, or any part thereof, or if at any time the said mortgagee or her assigns shall feel unsafe or insecure, then, and in that case, it shall be lawful for the said mortgagee or her assigns by herself or agent to take immediate possession of said goods, chattels, wares, merchandise, furniture, fixtures, books of account, and bills receivable wherever found, the possession of these presents being his sufficient authority therefor; and it is hereby expressly understood and agreed that said Caroline Weil may take immediate possession of said above described property and sell the same at private or public sale as in her discretion may seem best, or so much thereof as shall be sufficient to pay the amount due or to become due, taking, keeping, advertising, and selling of said property, together with a reasonable sum as an attorney's fee, the money remaining after paying said sums, if any, to be paid on demand to the party of the first part. Said sale to take place in the city of Omaha, Douglas county, Nebraska. In case of public sale said Caroline Weil shall give at least twenty days' notice of said sale by advertising in some newspaper printed in said Douglas county, Nebraska.

"Witness my hand and seal, this 14th day of January, 1889.

JACOB WEIL, JR.

"Witness:

"A. S. CHURCHILL."

In the amended petition it is alleged, in regard to the several mortgages executed by Weil, "that said alleged mortgages were made and delivered at the same time, were filed for record at the same time, and possession taken of the property under said instruments at the same time; that all the steps taken from the beginning leading up to the making of said instruments and since were a part of

the same transaction, and neither of said instruments was superior to the other, but both were on the same footing, and there was no arrangement as between them as to priority or order of payment; that in reality they are one instrument. In said instrument to Caroline Weil it was provided that it should secure the payment of a debt to a third party, one Meyer Weil, who is not made a party hereto, but is a beneficiary thereunder, and by said instruments the said Lee Rothschild and Caroline Weil become trustees for the said Meyer Weil, and thereby said instruments constituted an assignment for the benefit of the creditors of Jacob Weil, Jr., of all his property, and void because contrary to the assignment law of Nebraska." The testimony tends to sustain the allegations of the amended petition, and the case, so far as the assignment and the trust relation of the assignee, seems to be identical with that of *Bonns v. Carter*, 20 Neb., 566.

The answer of Carolina Weil, duly verified, is in the record, but we find no affidavit made by her as to the amount loaned her son. There are affidavits of Jacob Weil, Jr., and others, and a number of these tend to sustain the claim of the plaintiffs for a receiver. The court seems to have been fully justified in making the appointment in question and the order must be

AFFIRMED.

THE other judges concur.

33 876
36 838

STATE, EX REL. SAM'L P. BRIGHAM, v. CITY OF SOUTH
OMAHA ET AL.

[FILED FEBRUARY 17, 1892.]

1. **LIQUORS: APPLICATION FOR LICENSE: NOTICE MUST BE PUBLISHED CONTINUOUSLY.** The applicant for a license to sell intoxicating drinks must cause a notice of his application to be published at least two weeks in a newspaper published in the county, having the largest circulation therein. This notice is to be continued for two weeks. It is to be published in every issue of the paper. If the paper is published daily, then the notice must be published daily. If the paper is published weekly then weekly publication will be sufficient.
2. ———: ———: **THE OBJECT OF THE NOTICE** is to give as wide publicity as possible to the plaintiff's application so that if any person knows of any violation of the license law by the applicant, or any valid reason why license should not be granted to him, he may come forward and make objection.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

E. W. Simeral, for plaintiff in error, cited: *State, ex rel. Foster, v. Barton*, 27 Neb., 481, *State, ex rel. Weber, v. Bays*, 31 Id., 514; *Whitaker v. Beach*, 12 Kan., 493; *State v. Collins*, 33 Id., 77; *Williams v. Williams, Id.*, 149; *Pelton v. Drummond*, 21 Neb., 492.

David L. Cartan, contra, cited: *Davis v. Huston*, 15 Neb., 28; *Brewer v. Springfield*, 97 Mass., 152; *Andrews v. R. Co.*, 14 Ind., 172.

MAXWELL, CH. J.

In August, 1891, the relator filed a petition for a *mandamus* against the defendants, in the district court of Douglas county, as follows:

"Comes now the said plaintiff, the state of Nebraska, at

the relation of Samuel P. Brigham, and for cause of action against the said defendants alleges:

"1. That said relator, Samuel P. Brigham, is now, and for over a year last past has been, a resident, citizen, and voter of the city of South Omaha, Douglas county, Nebraska.

"2. Complainant further shows that the said city of South Omaha is a municipal corporation organized and existing and governed by the laws of the state of Nebraska for such purposes made and provided.

"3. That the said defendant William G. Sloan is the mayor of said city and the other defendants are the duly elected and qualified members of the city council of said city, and as such city council of the said city of South Omaha have power to license, regulate, and prohibit the sale, or the giving away of malt, spirituous, vinous, mixed, or fermented liquors within the limits of the said city of South Omaha.

"4. Plaintiff further shows to the court that on the 2d day of April, 1891, one Edward Burk duly made application to the said defendants for a license to sell liquor by filing with the city clerk of said city of South Omaha his petition therefor, signed as by law required, and that thereupon Edward Burk caused to be published in the Omaha *World-Herald*, a daily newspaper printed in said county, a notice of his the said Burk's application for said license.

"Plaintiff further states that said notice was published in said *World-Herald* on the 3d day of April, 1891, and also on the 10th day of April, 1891, and that there was no other or further publication in said newspaper of said notice; that said newspaper was at the time said notice was so published a daily paper issued every day and was issued every day between the 3d and the 10th days of April, 1891. * * *

"Plaintiff further shows to the court that on the 29th

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day of April, and long prior to the granting of the said license, said relator filed in the office of the city clerk of said city a written remonstrance against the granting of said license to said Edward Burk. * * *

"Plaintiff further alleges that said city council never set a day or time for the hearing of said remonstrance, but did, notwithstanding the same, and on the 14th day of May, 1891, grant and issue to said Edward Burk a license to sell liquor as in said Edward Burk's petition prayed. And immediately thereafter, and as soon as possible for relator so to do, he gave notice to defendants of his intention to appeal said matter of the application of Edward Burk for a license, his remonstrance thereto and the granting and issuance thereof, to the district court of said Douglas county, Nebraska, and your relator obtained and filed a full and a complete transcript of the record and evidence in said matter in the office of the clerk of the district court of said Douglas county, Nebraska, on the 21st day of May, 1891, thereby perfecting his said appeal of said matter. Immediately thereafter, and on the 21st day of May, 1891, relator gave to said defendants a notice in writing that he had perfected his said appeal and demanded that said defendant as such city council aforesaid, recall, cancel, and revoke the license of said Edward Burk pending the said appeal in the said district court of said Douglas county, Nebraska. Defendants refused, and still refuse, to cancel, revoke, or recall said license pending said appeal.

"5. Relator further shows to the court that he is without adequate remedy at law in the premises.

"Wherefore your relator prays that he have a writ of *mandamus* to compel the said defendants, the mayor and city council of the said city of South Omaha, to cancel, revoke, and recall said license so as aforesaid granted and issued to said Edward Burk, and until the hearing of the said appeal so as aforesaid made and perfected by said relator, or show cause if any there be why said writ should

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not be granted, and that such other order may be made in the premises as may be just and equitable."

An answer was filed to this petition which need not be noticed.

The case was submitted to the court on the following stipulation of facts:

"It is hereby stipulated and agreed by and between the parties, that the within entitled cause may be submitted to the court on the following agreed state of facts:

"The first, second, and third paragraphs in relator's petition are admitted.

"The application of one Ed. Burk to the defendants for a liquor license in form as required by law on the 2d day of April, 1891, is admitted.

"The publication of such notice of application is admitted by Burk, in the Omaha *World-Herald* on the 3d and 10th days of April, 1891, and at no other times, and the publication of said *World-Herald* as a daily paper, on every day between the 3d and 10th days of April, 1891, is admitted as in relator's petition alleged. The proof of said publication is admitted.

"It is admitted that relator filed a protest against the granting of a license to said Burk, on the grounds that the notice given by publication as aforesaid was not sufficient, in so much as it was not published every day for two weeks.

"It is admitted that the city council did set a time for the hearing of the remonstrance so filed, and that on the day so fixed, no testimony was offered on either side, and that on the 14th day of May, 1891, a license was issued to Burk which the defendants refused to revoke, recall or cancel, notwithstanding the relators demands that they do so.

"The filing of a transcript of the records of the city council in the matter of said Burk in the district court of Douglas county, Nebraska, and that said record is com-

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pleted by an affidavit of the assistant of the city clerk, filed by defendants in this cause is admitted.

"It is agreed by and between the parties that the sufficiency of Burk's publication of notice is the only point on which the adjudication of the court is required.

"The relator's want of an adequate remedy at law is admitted."

Section 2, chapter 50, Compiled Statutes, reads as follows:

"No action shall be taken upon said application until at least two weeks' notice of the filing of the same has been given by publication in a newspaper published in said county having the largest circulation therein, or, if no newspaper is published in said county, by posting written or printed notices of said application in five of the most public places in the town, precinct, village, or city in which the business is to be conducted, when, if there be no objections in writing made and filed to the issuance of said license, and the county board is in session and all other provisions of this chapter have been fully complied with, it may be granted."

"Sec. 3. If there be any objection, protest, or remonstrance filed in the office where the application is made, against the issuance of said license, the county board shall appoint a day for hearing of said case, and if it shall be satisfactorily proven that the applicant for license has been guilty of the violation of any of the provisions of this act within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license.

"Sec. 4. On the hearing of any case arising under the provisions of the last two sections, any party interested shall have process to compel the attendance of witnesses, who shall have the same compensation as now provided by law in the district court, to be paid by the party calling

said witnesses. The testimony on said hearing shall be reduced to writing and filed in the office of application, and if any party feels himself aggrieved by the decision in said case he may appeal therefrom to the district court, and said testimony shall be transmitted to said district court and such appeal shall be decided by the judge of such court upon said evidence alone."

It will be observed that publication of the application is to be made for at least two weeks in the newspaper published in said county having the largest circulation therein. The object of the publication is to give the widest possible publicity to the application in order that those who consider the applicant an unfit person to conduct a saloon may have an opportunity to remonstrate against the issuing of license. The petition must set forth that the applicant is a person of respectable character and standing and a resident of the state. A liquor seller is forbidden to sell or furnish liquor to any minor, apprentice, or servant under twenty-one years of age, or to an Indian, insane person, or a drunkard. He must also keep his place of business closed on Sundays and on the day of any general or special election.

There are other provisions which it is not necessary to notice. If the applicant has been guilty of any violation of any of the provisions of the act within the space of a year before making the application, or if any former license has been revoked, for any misdemeanor against the laws of the state, then the board "shall refuse to issue license."

The statute recognizes the fact that the traffic in intoxicating liquors is an evil, and that it is necessary to regulate and control the same. To place the traffic in the hands of respectable persons the law requires the applicant to publish a notice for two weeks in the newspaper published in the county having the largest circulation therein, that he has applied for license for the ensuing year. The ob-

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ject of this notice is to apprise every resident of the county of the application, so that if any person knows of any violation of the law by the applicant, he may come forward and remonstrate against the issuing of license. This notice is to have as wide publicity as possible. It is to be published two weeks, not weekly, unless the paper having the largest circulation in the county is published weekly. Where such paper is published daily, then the notice is to be published as often as the paper is, viz., daily; It is a notice to be published two weeks. That we understand requires a continuous publication, viz., in every issue of the paper. As the notice in this case was not published for two weeks, it follows that the court below erred in rendering judgment for the defendants. The judgment of the court below is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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The wife of one who, under a quitclaim deed, holds a contract for the purchase of school land, was not entitled to dower therein under act in force in 1879. *Crowl v. Harrington*.....107, 111-13

Easements. See PARTY WALLS.

Ejectment.

Action may be brought, though some of those in possession are absent from the state. *Omaha & F. L. & T. Co. v. Parker*.....776, 779

Elections. See COUNTY ATTORNEY, 1, 2. OFFICERS.

1. Legislature cannot constitute supreme court a board to try contests of. *Miller v. Wheeler*..... 769
2. The twenty days allowed to a contestant for a county office will not be held to have commenced to run until the six days for canvassing have expired, unless the record discloses an earlier canvass. *Sawyer v. Sweet*.....633-4
3. In a school meeting where the correctness of a teller's count of the vote is questioned, and a division is ordered by the chairman, his announcement of the result thereof must be accepted. *State v. Hutchins*.....339-40
4. Parol evidence is admissible on a trial growing out of such proceedings, to show the incorrectness of the teller's count, and to contradict the district records. *Id.*
5. A legal voter in a precinct containing a city of the second class over 2,501, but who resides outside the city limits, cannot be registered by the board of registration in such city. *State v. Leavitt*.....289-90
6. But where no polling places are provided for such precinct, outside the city limits, such voter is entitled to vote at any one of those situated within the city. *Id.*...290-2
7. *Semble*, County may be compelled by *mandamus* to provide a suitable number of polling places. *Id.*.....291-2

Eminent Domain. See HIGHWAYS.

1. Railroad company formed by consolidation may exercise.
Trester v. M. P. E. Co......177-9
2. Certificate of organization of a railroad company need not specify termini of a branch line nor counties through which it is to run, in order to exercise right of, in one of such counties. *Id.*.....179-81
3. Requisites of petition for appointment of appraisers. *Id.*,
171-2, 183-5
4. Objections as to want of notice and failure to have appraisers sworn are waived by pleading over and appeal.
Id......185-6

Error Proceedings. See ATTACHMENT, 3. LIQUORS, 6.

1. Assignment in petition, "Errors of law occurring at the trial," etc., not specific enough to secure review of ruling on questions of evidence. *Lowe v. Omaha*.....590-1
2. But such an assignment is sufficient in a motion for a new trial. *Labaree v. Klosterman*.....156-7
3. Are not commenced in time where final judgment was rendered July 8, 1890, and record filed in supreme court July 9, 1891. *Chapman v. Allen*.....129
4. Motion for a new trial necessary in an equity as well as a law case, but failure to file such motion is not sufficient ground for dismissal. *Gaughran v. Crosby*.....34

Error Without Prejudice. See EVIDENCE, 11. INSTRUCTIONS, 5.

1. *Ackerman v. Bryan*.....518
2. Not reversible. *First National Bank v. Miltonberger*.....862
Ballard v. Hansen.....868
3. Improper admission of testimony not affecting substantial rights, *Id.* *Trester v. M. P. E. Co.*.....186-7

Estates.

- Those less than a freehold are not estates of inheritance and wife had no dower therein under statute in force in 1879.
Crawl v. Harrington111-13

Estoppel.

- Allegations in pleadings as to the citizenship of a corporation, do not estop the same parties from making different claims as to such citizenship. *Trester v. M. P. E. Co.*.....176-7

Eviction. See LANDLORD AND TENANT, 2.**Evidence.** See BASTARDY. CONFESSIONS. LARCENY. REVIEW, 3.

a. *Admissibility.*

1. Offer of, must be made in order to predicate error upon its rejection. *Brecher v. Treitschke*..... 699
2. Admission of incompetent, if prejudicial, is reversible error. *Monitor Flow Works v. Born*.....747, 752
3. In action on promissory note, evidence of forgery by payee on other and unconnected occasions is incompetent. *Id.*, 752
4. Minute book of village trustees admissible in relation to their proceedings in granting liquor license. *Scott v. Chope* 89
5. Where there is a failure to show that the wife of an occupant of a farm had authority to control the business in her husband's absence, her admissions regarding such business are inadmissible, and should not be submitted to the jury. *Norfolk Natl. Bank v. Wood*.....113, 117
6. Violations of law within a year, by applicant for liquor license, may be proved by any competent evidence and burden is upon remonstrators. *Livingston v. Corey*.....369-72
7. Evidence of fraudulent representations by agents of a railroad company, made to certain freeholders and inducing them to sign a petition for a bond election, is admissible as a part of the *res gestæ* in an action to enjoin the issue of such bonds, though the statements were made at the meeting prior to the time when the petition was signed. *Wul-lenwaber v. Dunigan*.....480, 482-4
8. Likewise where the representations were made by one agent and the petition presented by another. *Id.*..... 483
9. Collection or loan registers are not admissible as books of account. *Labaree v. Klosterman*.....159-61
10. But they are admissible as memoranda to refresh the memory of a witness, though they were not written by him, but he has personal recollection of their facts, and though the real writer is beyond the reach of the court and his whereabouts unknown, but his handwriting proved. *Id.*..... 161
11. Exclusion of testimony subsequently admitted, no ground of error. *Id.*.....150, 157-8
12. Rulings in action on bond guaranteeing payment of notes, approved. *Id.*.....161-5
13. Must agree with the pleadings. *Traver v. Shaeffle*..... 548
14. In action based in part upon fraudulent representations as to quality and value of goods purchased, evidence of value of those actually delivered is admissible. *Id.*.....540-1

b. Parol.

15. Where the written contract provided that "all of said goods are to be selected by the said" defendant, parol evidence is inadmissible to show that plaintiffs contracted with him for goods of a different character than those selected.
Id...... 546
 16. Parol evidence is admissible to show that the count of a vote at a school meeting, as reported by a teller, is incorrect, the district records to the contrary notwithstanding.
State v. Hutchins339-40
 17. Parol evidence is admissible to show that a term used in a will is not the one intended. *Seebrook v. Fedawa* 416
 18. Where parties enter into a written contract for the purchase of land, price to be paid as soon as deed is executed and abstract furnished, testimony is inadmissible that grantee paid grantor \$30, which the former was to repay if he failed to comply with the contract, or if the latter failed he was to forfeit that amount, while it was to be deducted from the purchase price in case he took the property. *Kaserman v. Fries*.....428-9
- Executions.** See CORPORATIONS, 2. INJUNCTION. PARTNERSHIP, 2. VENDOR AND VENDEE, 2.
- Levy upon and sale of property of B, under process against that of A, renders both officers and sureties liable, and also the plaintiff, where he directs such levy and sale.
Walker v. Wonderlick.....507-9
- False Representations.** See EVIDENCE, 7, 8. INSURANCE, 2. SPECIFIC PERFORMANCE, 1.
- Fees.** See ATTORNEYS. WILLS, 2.
- Final Order.** See ATTACHMENT, 3.
Order appointing a receiver is. *McCord v. Weil* 870
- Findings.** See JUDGMENTS, 7.
- Fire Insurance.** See INSURANCE.
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- Forcible Entry and Detention.** See BILLS OF EXCEPTIONS, 3. LANDLORD AND TENANT, 4.
- Foreclosure.** See JUDICIAL SALES. NEGOTIABLE INSTRUMENTS, 6. REDEMPTION.
- Foreign Corporations.** See ESTOPPEL. TAXATION, 1.
- Forfeiture.** See PENALTY.

Forgery. See EVIDENCE, 3.

Fraud. See INTERVENTION, 1. LIMITATION OF ACTIONS, 2. PLEADING, 10.

Not presumed. *Henry v. Vliet*..... 136

Fraudulent Conveyances. See ATTACHMENTS, 4, 5. RECEIVERS, 2.

1. Failure to show consideration; property held subject to creditor's bill. *Bulls v. Hunter*..... 119
2. Decree setting aside deed as made to defraud creditors affirmed. *Allis v. Newman*..... 597
3. A chattel mortgage covering all of a debtor's property and greatly in excess of the amount of the debt is void as to other unsecured creditors. *Thompson v. Richardson Drug Co*..... 715
4. Property covered by a bill of sale given as security for a debt, but not filed as required by law, is subject to claims of other creditors. *Conway v. St. Joseph Iron Co*..... 455-6
5. The assignee of a school land certificate, who knows of the insolvency of his assignor, but gives no consideration, though he pays an amount due the state, has a lien only for the latter amount, and subject to such lien the land is liable to claims of creditors. *Conn. River Sav. Bank v. Barrett*..... 709

Freeholds. See ESTATES.

Grading. See MUNICIPAL CORPORATIONS, 4.

Habeas Corpus.

1. A single judge of the supreme court cannot grant. *In re White*..... 814-15
2. Proceedings should be instituted in county where alleged unlawful restraint is exercised. *Id*..... 815
3. May be reviewed on error. *Id*.

Highways. See STREETS.

Before lands may be taken for, county must guarantee compensation to owners. *Zimmerman v. Kearney County*..... 622-3

Homestead.

1. *Allis v. Newman*..... 614-15
2. Where owner has agreed to satisfy judgment from proceeds of sale of, a remote grantee purchasing subject to the judgment cannot claim the exemption. *Comstock v. Wilson*..... 619

Homicide. See MASTER AND SERVANT.

- Husband and Wife.** See ASSIGNMENTS FOR CREDITORS, 3.
DOWER. EVIDENCE, 5. SUMMONS, 3.
Land purchased with funds of wife, but deed taken in name of husband; *held*, that a judgment against him as surety on a note could not be satisfied by execution against the land. *Mosher v. Neff*.....772-3
- Identity of Issues.** See APPEAL, 2.
- Indorsement.** See NEGOTIABLE INSTRUMENTS, 1, 4, 9.
- Infants.** See SUMMONS, 1.
- Injunction.**
1. Of execution sale denied. *Comnock v. Wilson*..... 615
2. A petition for, to restrain levy of execution in replevin, which fails to state that the judgment was unjust and that defendants are owners of the property, and have no adequate remedy at law, the sole ground being want of jurisdiction, at the time, of the justice who rendered judgment, is insufficient. *Lining v. Glenn*.....191-2
- Injuries to Person.** See NEGLIGENCE.
- Insolvency.** See FRAUDULENT CONVEYANCES. RECEIVERS.
- Instructions.**
1. Failure of judge to read to jury is reversible error. *Veneman v. McCurtain* 645
2. May be refused where ground is already covered by. *Bull v. Wagner* 248
3. An action against officer for conversion in levying executions, *held*, erroneous. *Thompson v. Benner*193-9
4. In action on promissory note, inconsistent and misleading; judgment for defendant reversed. *Farmers Bank v. Harshman* 449
5. Not ground for reversal unless prejudicial. *Labaree v. Klosterman*..... 166
Gamble v. Wilson 274
6. A material inference from the testimony may be submitted. *Labaree v. Klosterman* 170
7. In action on bond guaranteeing payment of notes, approved. *Id*.....165-71
8. Each paragraph should contain but a single proposition. *Norfolk Natl. Bank v. Wood*..... 118
9. *Held*, Erroneous for submitting admissions of wife in regard to her husband's business, without showing that she had authority to control it; also a part of the description in a chattel mortgage, as a whole. *Id*.

Insurance.

1. A policy covering realty and distinct items of personalty is a severable one, and entitles the insured to recover for the loss of a single item of personalty, though the premium is stated as a lump sum for the whole. *Phoenix Ins. Co. v. Grimes*.....346-8
2. Action on policy; defense false representations; evidence of untrue statements in application; testimony conflicting as to whether questions were read to insured, who was illiterate; evidence also of attempted adjustment of loss by insurer; judgment for insured affirmed. *Dwelling House Ins. Co. v. Weikel*672-3

Insurance Companies. See TAXATION, 1.**Interest.** See USURY.

- A contractor on public works is entitled, by implication, to interest on payments due him, from the time of the acceptance of the work, and on a fund reserved by the contract for six months, interest runs from the end of that period. *Murphy v. Omaha*.....407-9

Intervention. See PARTNERSHIP, 2.

1. Petition for, held not to state facts showing fraud, but mere epithets and assertions thereof. *K. C. & P. E. Co. v. Fitzgerald*..... 142
2. Mere creditor not entitled to; intervenor must have a direct interest or lien. *Id.*
3. Assignee for creditors should intervene to defend an attachment of the assignor's property. *Commercial Natl. Bank v. Neb. State Bank*.....305-6

Judgments. See INJUNCTIONS. REPLEVIN, 1. VENDOR AND VENDEE, 2.

1. Form. *Nagel v. Loomis*.....503-4
Singer Mfg. Co. v. Dunham 690
2. Error in overruling motion for, on pleadings waived by going to trial on merits. *Becker v. Simons*..... 684
3. Entry of, on verdict, within judicial discretion of court. *Becker v. Simons*..... 685
4. Agreement for perpetual injunction of, construed. *Yates v. Kinney* 856
5. Assignee of, takes subject to an attorney's lien. *Id.*
6. One seeking to set aside, on the ground that he has a meritorious defense, must plead specifically the facts constituting the same. *Hughes v. Housel*.....708-9

7. Not void for want of findings though subject to reversal.
Petalka v. Fille..... 758
8. Will not be enjoined on behalf of defendant if it does not
appear that he has a valid defense. *Id.*..... 759

Judicial Opinions. See SYLLABUS.

Judicial Sales.

1. Appraisers have no right to deduct, from gross appraised
value, amount of the mortgages to foreclose which sale is
ordered. *Watson v. Tromble* 452
2. But debtor is not prejudiced if property is actually sold
for two-thirds of its appraised value, and, in any event,
confirmation cures all defects. *Id.*..... 453

Jurisdiction. See ADMINISTRATION OF ESTATES. MUNICI-
PAL CORPORATIONS, 3. SUPREME COURT, 2.

Question of, not raised by court on its own motion. *Courtney*
v. Neimeyer..... 799

Jury. See CHALLENGE. VERDICT.

1. Permitting jury to return to their room to change their
verdict, after having once returned a sealed verdict, held,
not error. *Scott v. Chope*.....89-91
2. The fact that refreshments are procured for a jury which
has retired, by a mere bystander, though by request of a
juror, and handed in with the remark that they are from
the parties to the action, will vitiate the verdict, and ren-
der the procurer guilty of contempt of court. *Veneman*
v. McCurtain.....644-5

Justice of the Peace. See APPEAL, 2, 4. BILLS OF EX-
CEPTIONS, 3. CHANGE OF VENUE.

Landlord and Tenant.

1. Tenant cannot use premises for a purpose prohibited by
the lease. *Hayward v. Range*.....839-40
2. Eviction releases tenant from obligation to pay rent; but
a mere trespass or removal from the building, of prohib-
ited articles will not. *Id.*.....840-1
3. Nor will reletting, after tenant has abandoned the premi-
ses, voluntarily. *Id.*..... 841
4. Refusal of tenant to pay rent according to the terms of
his lease, terminates latter, in absence of contrary provi-
sion, and renders tenant liable to an action of forcible de-
tention. *Pollock v. Whipple*.....754-5

Larceny. See ROBBERY.

Owner should be called, in prosecution for, to prove his non-
consent to the taking. *Bubster v. State*.....664-5

Lease. See LANDLORD AND TENANT.

Legislation. See STATUTES.

License. See LIQUORS.

Liens. See ATTORNEYS. MECHANICS' LIENS.

Limitation of Actions. See ELECTIONS, 2. ERROR PROCEEDINGS, 2.

1. Statute must be specially pleaded. *Alexander v. Meyers*... 775
2. In cases of fraud, statute runs from discovery thereof, or of facts leading to it. *Hughes v. Housel* 709
3. Statute not suspended by absence of defendant as long as suit may be maintained. *Omaha & F. L. & T. Co. v. Parker* 779
4. Where a tax purchaser receives a deed void on its face, a suit to foreclose his tax lien is barred five years thereafter. *Warren v. Demary*..... 329

Liquidated Damages. See PENALTY.

Liquors.

1. Traffic in, recognized by the law as an evil. *State v. South Omaha* 881
2. Where paper of largest circulation in the county is a daily, notice of application for license must be published each day for two weeks. *Id.*.....881-2
3. In action for loss of support, where there was some evidence tending to disprove the theory that deceased froze to death while intoxicated, an instruction that if he died from injuries inflicted by another because of intoxication from liquors furnished by defendants, the latter and their bondsmen would be liable, approved. *Scott v. Chope*,
74-5, 86-7
4. Minute book of village trustees is admissible in evidence in relation to their proceedings in granting license. *Id.*... 89
5. *Semble*, A *bona fide* sale of his business by a licensed saloon-keeper, relieves himself and bondsmen from liability for conduct of such business by purchaser, nor need the seller secure a cancellation of his license. *Id.*.....87-8
6. Whether proceedings to reverse judgment of district court affirming order granting license should not be by error rather than appeal, *quære*. *Livingston v. Corey*..... 367
7. Petitioners may sign application after it has been filed with city clerk and notice given; and latter need not be republished. *Id.*.....367-8

8. Application *held* to have been signed by requisite number of qualified petitioners. *Id.*.....368-9
9. Sale of adulterated liquors, or to minors, within a year, disqualifying applicant, may be proved by any competent evidence, and burden is on remonstrators. *Id.*.....369-72
10. Licensee is bound to know that his liquors are unadulterated. *Id.*..... 371
11. Objection that no ordinance was in force authorizing granting of license cannot be first raised in supreme court. *Id.*..... 371

Locus. See ACTIONS, 2. VENUE.

Malpractice. See NEGLIGENCE, 2.

Mandamus. See COUNTIES, 3.

Lies to compel sheriff, who has been succeeded as assignee for creditors, to quitclaim to his successor real estate conveyed by deed of assignment. *Strunk v. State*324-7

Marriage. See BASTARDY.

1. Instructions discussing, approved. *Olson v. Peterson*.....360-3
2. Not conclusively presumed from cohabitation and conduct of parties. *Id.*..... 363

Master and Servant. See NEGLIGENCE, 2.

A master is not liable to the intestate of one killed by the former's servant when the act was committed outside the scope of the employment. *Davis v. Houghtellin*..... 593

Maxims.

"*Expressio unius est exclusio alterius*" applies to sec. 2, art. 6, Const., providing for jurisdiction of supreme court. *Miller v. Wheeler*..... 769

Measure of Damages. See REPLEVIN, 3.

Mechanics' Liens.

1. Decree allowing, affirmed upon review of evidence. *Johnson v. Blazer*..... 841
2. One who furnishes lumber for the erection of shanties and stables to a subcontractor on a railroad, is not entitled to a lien on the road-bed. *Stewart-Chute Lumber Co. v. M. P. R. Co* 31-2
3. Attach for furnaces placed in a building. *U. S. Natl. Bank v. Bonacum* 823
4. Church *held* liable for furnaces placed in its building under contract with pastor. *Id.*..... 822
5. Judgment of trial court, after viewing furnaces, as to defects therein affirmed. *Id.*.....822-3

6. Lien attaches to a lot and building, for materials contracted for in the name of a firm by two members thereof, though the legal title of lot is in them individually. *Hoagland v. Lusk*..... 377
 7. Are not waived, unless so intended by the parties, by taking debtor's note for balance due on account, nor by giving a receipt, nor by accepting note and chattel mortgage as collateral security. *Id*.....377-80
 8. From an allegation in petition to foreclose, that "plaintiff furnished said material to the said defendant, * * * for the erection of said house," it may be inferred that the material was used in such erection. *Pomeroy v. White Lake Lumber Co*..... 245
 9. Right of a material-man to, depends not on relation of agency between contractor and owner, but upon fact of furnishing materials. *Id*.
 10. Petition drawn as though contract had been made with building contractor instead of owner sustained after demurrer overruled and plaintiff had answered. *Id*.....242, 245
- Minors.** See LIQUORS, 9. SUMMONS, 1.
- Misconduct.** See JURY.
- Misjoinder of Causes.**
 Objections to, waived unless raised in trial court. *First Natl. Bank v. Miltonberger*..... 849
- Mistake.** See VOLUNTARY PAYMENT. WILLS, 1.
- Mortgages.** See NEGOTIABLE INSTRUMENTS, 6. REDEMPTION.
 Deed absolute in form, but in fact a mortgage, passes legal title to grantee. *Gallagher v. Giddings*..... 227
- Motions.**
 Must be specific. *Walker v. Morse*.....651-2
- Municipal Corporations.** See STREETS.
1. Policy of the law relative to the annexation of territory, discussed. *Hartington v. Luge*.....629-30
 2. Benefits to property sought to be annexed should appear; annexing large tracts of agricultural lands not favored. *Id*.
 3. Passage by council of city of second class desiring to annex contiguous territory, of a resolution to that effect, is a jurisdictional prerequisite to action by the district court under sec. 99, ch. 14, Comp. Stats., and evidence of such passage must expressly appear in the record. *Secord v. Conroy*.....434-6

4. Rule of compensation for damages to abutting property by grading street, is difference in market value of such property before and after the grading; special though not general benefits should be set off against such damages.
Lowe v. Omaha.....593-6
 5. Market value defined. *Id*..... 594
- Murder.** See MASTER AND SERVANT.
- Sentence of life imprisonment reduced to twenty years where defendant killed one attempting to apprehend him without a warrant. *Nelson v. State*..... 528
- National Banks.**
- Usury. *First Natl. Bank v. Miltonberger*..... 847
- Negligence.** See CLERK OF DISTRICT COURT. MASTER AND SERVANT.
1. Action against railroad company for injuries to passenger; testimony conflicting and properly submitted to jury; instructions approved; judgment for plaintiff reaffirmed on rehearing. *O. & R. V. R. Co. v. Chollette*..... 143
 2. Action by railway employe for negligent treatment by company surgeon of wound caused by fellow-servant; evidence reviewed; verdict held contrary to instructions and inconsistent with a special finding. *O. & R. V. R. Co. v. Hall*..... 229
- Negotiable Instruments.** See CONSIDERATION, 2.
1. Indorsement of note carries bill of sale given to secure it.
Gamble v. Wilson..... 273
 2. Judgment for defendant in action on note reversed because of inconsistent instructions. *Farmers Bank v. Harshman*, 445
 3. When the third day of grace falls on Sunday, presentment or demand on the day following is sufficient. *First Natl. Bank v. McAllister*..... 649
 4. *Bona fide* indorsement of a usurious note cuts off that defense, but bare indorsement raises no presumption of its *bona fides*. *First Natl. Bank v. Miltonberger*850-1
 5. Action on note given by payee for one-half interest in party wall, on a lot, the title to which maker had taken in his wife's name subject to a prior party wall agreement; judgment for plaintiff affirmed. *Stehr v. Raben*..... 437
 6. Provision in mortgage securing note, that upon default in payment of latter, or of any of the coupons thereto attached, entire note and mortgage should become due, and mortgagee should have immediate right to foreclose, enforced. *Lantry v. French*526-7

7. In an action upon note, where answer is a general denial, burden is upon and remains with plaintiff to prove genuineness of instrument. *Monitor Plow Works v. Born* 750
8. In such action evidence is inadmissible to show that the payee had, on other and unconnected occasions, forged paper. *Id* 752
9. Note indorsed by payee to enable indorsee to effect a trade; sale of note by indorsee for his own benefit at about two-thirds face value; subsequent discharge of note by payee and action against him by last purchaser for value of note. *Held*, That he could recover to the extent only of the consideration paid, with interest. *Faulkner v. White*.....203-4
10. The maker of notes placed with a bank as trustee to secure the claims of certain creditors of the payee, cannot purchase such claims at a discount and set off their face value against the notes; he can be credited only with the amounts actually paid by him. *Hughes v. Swartz*.....278-9
11. Where the consideration for a note is a jack warranted to be a sure foal-getter and proving not to be such, that defense cannot be set up against an indorsee before maturity, knowing of the warranty but not of its failure. *Rublee v. Davis*.....783-5

New Trial. See REVIEW, 7.

1. Not granted for merely cumulative, newly discovered evidence. *Hill v. Helman*..... 735
2. Motion for, assigning "errors of law occurring at the trial," entitles a party to a review in supreme court of rulings on questions of evidence. *Labaree v. Klosterman*.....156-7
3. But such an assignment is insufficient in a petition in error. *Lowe v. Omaha*.....590-1
4. Motion for, necessary before error can be prosecuted from equity or law case, but failure to file such motion is not sufficient ground for dismissal. *Gaughran v. Crosby*..... 34
5. Motion for, by five out of six defendants, with conclusive evidence to sustain the verdict as to but three, *held*, properly overruled as to all. *Scott v. Chope*.....92-3, 97
6. Where motion for, has been overruled, the court may, in consequence of a decision of the supreme court, reverse the former ruling, and allow the motion, and the opposing party must present evidence at the second trial, to save his rights. *Snow v. Vandewater* 735

Notice. See EMINENT DOMAIN, 4. LIQUORS, 2, 7. SUMMONS, 4.

Occupancy. See ADVERSE POSSESSION.

Occupation Tax.

Where a saloon-keeper has paid, without question, court will not examine validity of ordinance requiring. *Baker v. Fairbury* 679

Officers. See ARREST. EXECUTIONS.

Provisions for filling vacancies, in law creating an office, control those of general laws as to vacancies. *State v. Rankin*, 268

Onus Probandi.

1. On party pleading payment, to establish it by a preponderance of the evidence. *Curtis v. Perry* 523
2. On remonstrators against petition for liquor license, to prove that signers are not qualified and that applicant has violated the law within a year. *Livingston v. Corey*... 372
3. Burden of proving genuineness of a note, by plaintiff in action thereon, remains with him throughout the trial. *Monitor Plow Works v. Born*..... 750

Options. See CONTRACTS, 3, 4.

Ordinances. See OCCUPATION TAX.

Parties. See ASSIGNMENT. COUNTIES, 3. INTERVENTION, 2, 3.

Grantee may maintain action to reform his deed except when it is voluntary. *Gwyer v. Spaulding*.....580-1

Partnership. See MECHANICS' LIENS, 6. WORK AND LABOR, 1.

1. Judgment that property levied on was partnership property, *held*, supported by the clear weight of evidence. *Courtney v. Neimeyer*796, 800
2. Action by creditor of one of two parties engaged in stock dealing to sequester proceeds of a sale of cattle; petition for intervention by second party; evidence *held* to show partnership and want of any profits which could be applied to creditor's claim; intervention allowed. *Haas v. Rothschild* 206

Party Walls.

1. Agreement between adjoining owners relative to, binds purchasers subject thereto and creates an equitable charge upon the lots. *Slehr v. Raben* 440
2. Where one of two adjoining lot owners agrees *inter alia* to pay one-half the value of so much of a portion of a party wall as he should use, but before using such portion sells his lot subject to the agreement, he is not liable for use of the wall by his grantee. *Jordan v. Kraft*.....846-7

Payment. See ONUS PROBANDI, 1.

Hughes v. Swarts.....278-9

Penalty.

1. A provision in an executory contract for the sale of sheep at a fixed price, that the defaulting party should forfeit to the other \$1,000, is in the nature of a penalty where the actual damages may be readily determined. *Squires v. Elwood*.....127-8
2. The fact that no sheep of the agreed quality could be obtained at time and place of delivery, will not entitle such sum to be treated as liquidated damages. *Id.*..... 128

Personal Injuries. See NEGLIGENCE.

Place. See ACTIONS, 2. VENUE.

Pleading. See AMENDMENT. APPEAL, 2. ATTACHMENT, 9, 10. EMINENT DOMAIN, 3. ERROR PROCEEDINGS, 1, 2. ESTOPPEL. JUDGMENTS.

1. Petition to enjoin execution *held* insufficient. *Linsinger v. Glenn*.....191-2
2. Action for damages by fire; petition liberally construed and sustained. *Jewett v. Osborne*.....26-9
3. Petition for appointment of administrator; essentials; must allege jurisdictional facts. *Estate of Moore v. Moore*, 513, 515
4. Petition for intervention *held* to contain mere charges and epithets, not facts showing fraud. *K. C. & P. R. Co. v. Fitzgerald*..... 142
5. Not a sufficient allegation of usury that the "bond * * was given in payment of usurious interest by a contract for the payment of the same." *Anglo-American, etc., Co. v. Brohman*412-13
6. If petition fails to state a cause of action, answer does not waive such defect and it may be taken advantage of at any time. *Renfrew v. Willis*98, 106
7. Where plaintiff, after the filing of answer seeking affirmative relief, dismisses without prejudice, he should be permitted to file a reply in the nature of an answer to defendant's pleading. *Winters v. Means*..... 639
8. *Res adjudicata*; how pleaded. *Thomas v. Thomas*.....374-5
9. Omission of date of former judgment not fatal, though ground for a motion to make more definite and certain. *Id.*..... 375
10. Fraud must be pleaded and proved in order to avoid a judgment on that ground. *Id.*.....375-6

11. Averment in petition against attorney, for money collected by him, that defendant "neglected and refused to pay the same to the plaintiff though requested so to do," is a sufficient allegation of demand. *Fletcher v. Cummings* 794-5
 12. Petition to foreclose mechanics' lien drawn as though contract for materials had been made with building contractor instead of owner; demurrer by owner overruled and answer filed; evidence that materials were used in building the house; petition sustained. *Pomeroy v. White Lake Lumber Co.* 242, 245
 13. From allegation that "plaintiff furnished said material to the said defendant * * * for the erection of said house," it may be inferred that the material was used in such erection. *Id.* 245
- Practice.** See APPEAL. ERROR PROCEEDINGS. PLEADING. REVIEW.
- Prairie Dogs.**
Craig v. Weitner 484
- Presentment.** See NEGOTIABLE INSTRUMENTS, 3.
- Presumptions.** See ELECTIONS, 2. TRIAL, 2.
Are in favor of regularity of proceedings of trial court.
Becker v. Simonds 685
- Principal and Agent.** See REAL ESTATE AGENTS. MASTER AND SERVANT.
- Principal and Surety.** See CLERK OF DISTRICT COURT. EXECUTIONS. SUBROGATION.
A bond guaranteeing payment of notes "sold" by obligor to obligee, does not bind sureties to pay notes transferred between said parties for a consideration other than money.
Labaree v. Klosterman 153, 166-7
- Priority.** See ATTACHMENT, 9, 10.
- Process.** See SUMMONS.
- Protest.** See NEGOTIABLE INSTRUMENTS, 3.
- Public Corporations.** See CORPORATIONS, 1, 2.
- Public Works.** See INTEREST.
- Railroads.** See NEGLIGENCE. TAXATION, 3.
 1. The M. P. R. Co. held to be a domestic corporation. *Tvester v. M. P. R. Co.* 177-8
 2. A company formed by consolidation from pre-existing ones, may exercise the right of eminent domain and other corporate privileges. *Id.* 177-9

3. Articles of consolidation need not be recorded in county clerk's office. *Id* 179
 4. Certificate of organization of company need not specify termini of a branch line, or counties through which it is to pass. *Id*.....179-81
- Real Estate.** See CONTRACTS, 3. SPECIFIC PERFORMANCE, 1-3. STATUTE OF FRAUDS, 2.
- Real Estate Agents.**
- Action for commissions; petition *held* to state a cause of action. *Ackerman v. Bryan*.....516-17
- Receivers.** See CORPORATIONS, 2.
1. Order appointing, is a final order which may be reviewed in advance of the main case. *McCord v. Weil*..... 870
 2. Appointment of, for property of insolvent debtor, which was mortgaged entire to the exclusion of a judgment debtor, approved. *Id*..... 868
- Recording.** See FRAUDULENT CONVEYANCES, 4. RAILROADS.
- Records.** See COUNTIES, 4. MUNICIPAL CORPORATIONS, 3.
- Redemption.**
- Deed absolute in form given to secure payment of money; decree for reconveyance conditioned upon payment within a specified time, and absolute dismissal of petition to redeem, at the expiration of that time; *held*, that such dismissal forever barred the equity of redemption. *Galagher v. Giddings*.....227-9
- Reformation.** See DEEDS.
- Refunding.** See COUNTY BONDS.
- Registration.** See ELECTIONS, 5, 6.
- Release.** See CHATTEL MORTGAGES. CUMULATIVE REMEDIES.
- Religious Societies.** See MECHANICS' LIENS, 4.
- Remedies.** See ACTIONS. CUMULATIVE REMEDIES.
- Replevin.**
1. Judgment, if for defendant, must be in the alternative. *Singer Mfg. Co. v. Dunham* 690
 2. May be brought by indorsee of promissory note, secured by bill of sale, for property covered by latter. *Gamble v. Wilson*..... 273
 3. Measure of damages for replevin of attached property from officer is amount due on writ, if value of property equals it, with interest and costs. *Id*..... 275

4. Where, in such case, plaintiff admits on the record the value of defendant's possession, the general value of the property need not be proven. *Id.*
 5. Where attachment was issued for debt not due, officer must prove jurisdictional steps prior to issue of writ, in order to have the amount of his claim included in the assessment of his damages. *Id.*.....275-6
- Reply.** See PLEADING, 7.
- Res Adjudicata.**
How pleaded. *Thomas v. Thomas*.....374-5
- Res Gestæ.** See EVIDENCE, 7, 8.
- Return.** See AMENDMENT, 4.
- Review.** See BILLS OF EXCEPTIONS. ERROR PROCEEDINGS.
MUNICIPAL CORPORATIONS, 3. PRESUMPTIONS.
1. Errors must have been assigned in motion for new trial.
Becker v. Simonds..... 684
 2. Bill of exceptions wanting; presumptions in favor of judgment below. *Fuller v. Ryan*..... 697
Becker v. Simonds 685
 3. Affidavits must have been preserved in bill of exceptions.
Hunter v. Bell..... 249
Payne v. Jones 262
Veneman v. McCurtain..... 644
 4. *Semble*, Assignments of error ignored in briefs will be considered as waived. *Scott v. Chope*..... 42
 5. Objection that no ordinance was in force authorizing granting of liquor license cannot be first raised in supreme court. *Livingston v. Corey* 371
 6. Appeal waives errors in taking testimony before city council. *Id.*
 7. Under secs. 314 and 317 of the Code an assignment in a motion for a new trial of "errors of law occurring at the trial," will entitle a party to a review of the rulings below on questions of evidence. *Labaree v. Klosterman*.....156-7
 8. But such assignment is insufficient in a petition in error.
Lowe v. Omaha.....590-1
- Right of Way.** See TAXATION, 3.
- Roads.** See HIGHWAYS.
- Robbery.**
1. Defined. *Brown v. State*..... 357
 2. Under an information for, accused may be convicted of stealing from the person. *Id.*.....357-8

Sale.

1. Distinguished from exchange or barter. *Labaree v. Klosserman*..... 167
2. Action for purchase price of hogs sold; infectious disease alleged as defense; instructions as to warranty, etc., approved; judgment for plaintiff affirmed. *Stryker v. Crane*.....692-6

School Lands. See DOWER. FRAUDULENT CONVEYANCES, 5.

Schools. See ELECTIONS, 3, 4.

Self-Defense.

- Nelson v. State*..... 529

Sentence.

- Reduction of, for murder. *Id*..... 598

Set-Off. See NEGOTIABLE INSTRUMENTS, 10.

- Attorney's lien paramount to. *Rice v. Day* 205

Sheriffs. See ASSIGNMENTS FOR CREDITORS, 4. CONVERSION. EXECUTIONS. REPLEVIN, 3, 4.

1. Permission to amend return of, to conform to facts, discretionary with trial court. *Shufeldt v. Barlass*.....785, 788
2. Not liable to amercement by an attaching creditor, for failure to sell attached property under an order of sale, where such property is mortgaged and mortgagees have recovered a judgment against the officer for conversion. *Id*788-9

Special Benefits. See MUNICIPAL CORPORATIONS, 4.

Special Findings.

- May be refused where general verdict may stand, though such findings should be answered most favorably to party asking them. *First Natl. Bank v. Millonberger*..... 852

Specific Performance. See STATUTE OF FRAUDS.

1. Action to enforce contract for sale of lots; defense, false representations as to location, etc.; testimony conflicting; decree for defendants affirmed. *Omaha R. E. & T. Co. v. Murphy*..... 800
2. Not granted of agreement to exchange real estate unless it is mutual, certain, and fair. *Cooper v. Chittenden*.....318-19
3. So a decree is rightly refused where plaintiff had engaged to give a mere timber claim, his right to which was about to be lost because of his failure to comply with the law. *Id*.
4. One who obtains a decree for, of contract for sale of land, after alleging that he has placed the installments due on

the contract in the hands of a third party, forfeits the benefits of the decree by withdrawing the money so deposited. *Cheney v. Wagner*312-13

5. Defendant held entitled to his consideration for the land, without costs, latter taxed to plaintiff, including fee for defendant's attorneys. *Id.*..... 313
6. Optional agreement for a consideration of \$5, to convey real estate upon the payment of \$3,500; terms examined and held not to be inequitable; specific performance decreed. *Rice v. Gibbs*.....461-6

Statute of Frauds.

1. A contract of employment from month to month, and continued for three and one-half years, is not void as one not to be performed within a year; it must appear, to fall within the statute, that the parties did not intend performance within a year. *Kiene v. Shaeffing*.....23-4
2. Where a vendee of real estate gives checks in payment thereof, and afterwards, as he contends, agrees with the vendor to reconvey a portion of the property upon a return of his checks, vendee contending that he cashed the checks, an action by the vendor to recover the face value of the latter is not one to enforce a parol contract for the sale of land, but to recover purchase money. *Patterson v. Hawley*..... 440, 444

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See TABLE, ante, p. xxxv. CONSTITUTIONAL LAW.

CUMULATIVE REMEDIES.

1. May be amended by reference to the Compiled Statutes. *In re White*812, 818
2. And additional matter germane to the purpose of a chapter sought to be amended, may be added. *Id.*.....813, 818
3. Title objected to as indefinite; act not void for that reason. *Id.*.....813, 819-20
4. Act of February 19, 1877, relative to refunding county bonds, repealed by act of February 28, 1883; attempted amendment of former by act of 1885 invalid. *State v. Benton*832-3
5. Sec. 1, art. 4, ch. 77, Comp. Stats., is not void for want of uniformity because the proviso thereto prohibits county commissioners from foreclosing tax liens for \$200 or less, and contains no such restrictions upon individual tax lien holders. *Lancaster County v. Trimble*.....123-4
6. But said section is unconstitutional under sec. 4, art. 9,

- Const., because its effect would be to empower the commissioners to release taxes in certain cases. *Id* 125
- Stock (Corporate).**
Holyoke v. McMurtry 548
- Streets.** See MUNICIPAL CORPORATIONS, 4.
 Title to, may be acquired by adverse possession. *Meyer v. Lincoln* 572-3
- Subrogation.**
 A creditor cannot, to the exclusion of a surety, apply securities in his hands to the satisfaction of another debt. *Holliday v. Brown* 668, 663
- Summons.**
 1. Service on minor; Code provisions and object thereof. *Hughes v. Housel* 707-8
 2. Service in another state of summons directed to sheriff of a county of this state authorized. *Curtis v. Perry* 523
 3. Service upon husband, leaving also a copy for the wife, whom the officer saw in the house at the time, insufficient. *Holliday v. Brown* 661-3
 4. Affidavits of two defendants, that they had no notice of the pendency of the action, *held*, sufficient ground for opening a decree rendered on constructive service. *Gastin v. Bilsel* 739
- Sunday.** See NEGOTIABLE INSTRUMENTS, 3.
- Supreme Court.** See REVIEW. SYLLABUS.
 1. A single judge of, cannot grant the writ of *habeas corpus*. *In re White* 814-15
 2. Provisions of sec. 2, art. 6, Const., as to jurisdiction of, are exclusive and legislature cannot constitute it a board to try election contests. *Miller v. Wheeler* 769
- Sureties.** See BONDS. EXECUTIONS.
- Syllabus.**
 Law of a case will not be recapitulated in, where it has been stated on a former hearing. *O. & R. V. R. Co. v. Chollette*, 143
- Taxation.** See COUNTIES, 1-3. OCCUPATION TAX.
 1. Ch. 47, Laws 1889, requiring foreign insurance companies to pay a percentage of their gross receipts for the support of fire companies, is void under sec. 7, art. 9, Const. *State v. Wheeler* 563
 2. Under sec. 4, art. 9, Const., the legislature cannot empower county commissioners to release taxes by prohibiting the foreclosure by them of tax liens for \$200, or less. *Lancaster Co. v. Trimble* 125

3. A road-bed and right of way, running through several counties, but on which no track has been laid, is assessable by the local assessors and not by the state board. *R. V. & W. R. Co. v. Chase Co.*.....763-4

Tax Liens.

1. Suit to foreclose *held* to have been barred by adverse possession *Alexander v. Meadville*.....219
2. Suit to foreclose, *held* barred five years after receipt by plaintiff of a tax deed void on its face. *Warren v. De-mary*..... 329
Black v. Leonard.....746-7

Tax Sale.

1. County is liable to a purchaser from county treasurer of lands not taxable, for the amount paid, with interest. *Fuller v. Colfax Co.*..... 723
2. Claim should first be presented to county board, and, if rejected, appealed to district court. *Id.*
3. One who has neither demanded a deed within five years, nor commenced proceedings to foreclose tax certificate within the prescribed period, is not entitled to have the county refund his purchase money by reason of invalidity of tax sale. *Id.*

Tender.

Fletcher v. Cummings..... 795

Titles. See STATUTES, 3.

Torts. See MASTER AND SERVANT.

Transcript. See APPEAL, 3-5, 7. TRIAL, 2.

Trespass. See ADVERSE POSSESSION, 7. LANDLORD AND TENANT, 2.

Trial.

1. Remarks of counsel reflecting on opposite party criticised, but judgment not reversed. *Patterson v. Hawley*.....444-5
2. Where transcript of county judge shows continuance to May 27, with trial and verdict on May 29, trial presumed to have continued from May 27-9. *Brunck v. Wood*...639, 642

Trustees. See DEEDS, 4.

Trusts.

1. *Meyer v. Anderson* 1
2. *Mosher v. Neff* 770
3. *Hughes v. Housel*..... 709

Usury.

1. *Labaree v. Klosterman*.....165, 168
2. Must be specifically pleaded. *Anglo-American, etc., Co. v. Brohman* 409
3. *Bona fide* transferee of note, not subject to defense of, but mere indorsement raises no presumption of its *bona fide*.
First Natl. Bank v. Miltonberger..... 852
4. In absence of contrary understanding, payments on a usurious note should be applied to principal. *Id.*

Vacancies. See OFFICERS.**Value.**

- Lowe v. Omaha*593-6

Vendor and Vendee. See SPECIFIC PERFORMANCE.

1. *Patterson v. Hawley*..... 440
2. One who purchases property subject to a judgment lien, and whose grantor purchased from the judgment debtor, deducting the amount of the judgment from the purchase price, cannot, knowing of such deduction, enjoin the execution sale, though the property was the judgment debtor's homestead. *Comstock v. Wilson*615, 619

Venue. See CHANGE OF VENUE.

1. Action cannot be brought in county where defendant does not reside, if he is not actually there at the time. *Coffman v. Brandhoeffer*.....282-3
2. *Habeas corpus* proceedings should be instituted where alleged unlawful restraint is exercised. *In re White*..... 815

Verdict. See JUDGMENTS. JURY, 2.

1. Set aside for misconduct of jury. *Veneman v. McCurtain*.....644-5
2. Not to be directed where testimony is conflicting. *O. & R. V. R. Co. v. Chollette* 941
3. When in favor of plaintiff for \$19, and under the evidence it should have been for \$75 or nothing, defendant cannot predicate error thereon. *Ackerman v. Bryan*..... 518
4. Should be set aside when not in accordance with the instructions. *O. & R. V. R. Co. v. Hall* 239
5. General verdict inconsistent with special finding in same case should be set aside on motion. *Id.*

View. See MECHANICS' LIENS, 5.**Villages. See MUNICIPAL CORPORATIONS.****Voluntary Deeds. See DEEDS, 3.**

Voluntary Payments. See OCCUPATION TAX.

1. Cannot be recovered back. *Renfrew v. Willis*.....98, 106
2. If payment is made under mistake, latter must be pleaded and proved. *Id.*

Voters and Voting. See ELECTIONS.

Waiver. See EMINENT DOMAIN, 4. HOMESTEAD. JUDGMENTS, 2. MECHANICS' LIENS, 7. PLEADING, 12. REVIEW, 6. SPECIFIC PERFORMANCE, 4.

Warrant. See ARREST.

Warranty. See INSURANCE, 2. NEGOTIABLE INSTRUMENTS, 11. SALE, 2.

Wills.

1. Where property is described in, as lots 4 and 9 of block 32, and the testator owns only lots 3 and 9 of the block named, lot 3 passes by the will. *Seebrook v. Fedawa*..... 416
2. Fee of \$1,000 allowed attorneys for contesting a will which was sustained, there being, however, grounds for contest. *Id.*..... 417

Witnesses. See LARCENY.

May refresh memory by memoranda not made by them, but of the facts of which they have personal recollection, and upon mere proof of handwriting of real maker, he being beyond the reach of the court. *Labaree v. Klosterman*.... 161

Words and Phrases. (*Defined, Construed, Applied, etc.*) See MAXIMS.

1. "Appurtenance" includes furnaces. *U. S. Natl. Bank v. Bonacum* 823
2. "Contagion." *Stryker v. Crane*..... 694
3. "Estate." *Crawl v. Harrington*..112-13
4. "Furnish." *Pomeroy v. White Lake Lumber Co.*..... 245
5. "Hostile." *Ballard v. Hansen* 861
6. "Infection." *Stryker v. Crane*..... 694
7. "Market value." *Lowe v. Omaha*..... 594
8. "Non-resident." *Nagel v. Loomis*.....499, 503
9. "Robbery." *Brown v. State*..... 357
10. "Sale" and "sold." *Labaree v. Klosterman*.....153, 166-7

Work and Labor. See STATUTE OF FRAUDS, 1.

1. Action to recover for; defense, partnership; judgment for plaintiff affirmed. *Kelly v. Watts*..... 731
2. Action on contract to exterminate prairie dogs; held, that there had been a substantial compliance with the terms, and that plaintiff was entitled to recover. *Craig v. Weitner* 484

Writs. See SUMMONS.

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